No. 87-573-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Larry Lee Taylor

Docketed:
October 7, 1987

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Loveseth,Ian G.

NOTE* 9/1/87 ext. until 10/11/87 by Scalia, J. cited

Entry	Date	Note	Proceedings and Orders
1	Aug 31 1987		Application for extension of time to file petition and order granting same until October 11, 1987 (Scalia, September 1, 1987).
2	Oct 7 1987	P	Petition for writ of certiorari filed.
4	Nov 10 1987		DISTRIBUTED. November 25, 1987.
5	Nov 23 1987	P	Response requested -- BRW. (Due December 23, 1987)
6	Dec 23 1987		Brief of respondent Larry Lee Taylor in opposition filed.
7	Dec 23 1987	G	Motion of respondent for leave to proceed in forma pauperis filed.
8	Dec 29 1987		REDISTRIBUTED. January 15, 1988
9	Jan 19 1988		Motion of respondent for leave to proceed in forma pauperis GRANTED.
10	Jan 19 1988		Petition GRANTED.
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11	Feb 12 1988	G	Motion of respondent for appointment of counsel filed.
12	Feb 18 1988		Record filed.
		*	Certified copy of C.A. Proceedings and original record, eleven volumes, received.
13	Feb 22 1988		DISTRIBUTED. February 26, 1988. (Motion of respondent for appointment of counsel).
14	Feb 22 1988		REDISTRIBUTED. February 26, 1988
15	Feb 29 1988		Motion for appointment of counsel GRANTED and it is ordered that Ian G. Loveseth, Esquire, of San Francisco, California, is appointed to serve as counsel for the respondent in this case.
17	Mar 4 1988		Brief of petitioner United States filed.
18	Mar 4 1988		Joint appendix filed.
19	Mar 11 1988		SET FOR ARGUMENT, Monday, April 25, 1988. (2nd case).
20	Mar 31 1988		CIRCULATED.
21	Apr 1 1988	X	Brief of respondent Larry Lee Taylor (TBP) filed.
22	Apr 18 1988	X	Reply brief of petitioner United States filed.
23	Apr 25 1988		ARGUED.

87-573

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

LARRY LEE TAYLOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a minor violation of the time limitations of the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, justifies the dismissal with prejudice of an indictment charging a serious crime.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

UNITED STATES OF AMERICA, PETITIONER

v.

LARRY LEE TAYLOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 821 F.2d 1377. The order of the district court dismissing the indictment with prejudice (App., *infra*, 23a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1987. On September 1, 1987, Justice Scalia extended the time within which to file a petition for a writ of certiorari to and including October 11, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Speedy Trial Act of 1974 provides in pertinent part (18 U.S.C. 3162(a)(2)):

> If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. * * * In determining whether to dismiss the case with or without

prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

STATEMENT

On July 25, 1984, respondent was charged in a two-count indictment in the United States District Court for the Western District of Washington. The indictment charged respondent with conspiracy to distribute cocaine, in violation of 21 U.S.C. 846, and possession of 400 grams of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (E.R. 1-2).[1] Trial was scheduled to begin on November 19, 1984, which the parties agreed was one day before the end of the 70-day period allowed for commencing trial under the Speedy Trial Act, 18 U.S.C. 3161(c)(1) (E.R. 13, 109). On the day of trial, however, respondent failed to appear. He was declared to be a fugitive and a bench warrant was issued for his arrest (E.R. 50, 57, 112).

On February 5, 1985, respondent was arrested by local police officers in San Mateo County, California, for failure to appear on local petty theft charges (E.R. 17, 21, 50). Two days later, the United States District Court for the Northern District of California issued a writ of habeas corpus ad testificandum directing the local authorities to make respondent available to appear as a defense witness in *United States* v. *Seigert*, No. CR 84-0689 RFD, a federal narcotics prosecution pending in the Northern District of California (E.R. 42, 50). On February 7, 1985, the United States Marshals Service took custody of respondent pursuant to the writ and arranged for him to be held in the San Francisco County jail pending the *Seigert* trial (E.R. 20, 42). Respondent testified in that case on February 21, 1985, and following his testimony he was held for possible recall in that trial. The *Seigert* trial ended in a mistrial the following day. E.R. 42.

On February 28, 1985, the pending state charges against respondent were dismissed on motion of the district attorney (E.R. 25). The marshal was notified of the dismissal on March 1, which was a Friday (E.R. 51, 81). The State's notice informed the marshal that "effective today [respondent] becomes your prisoner" (E.R. 51).

The following Wednesday (March 6, 1985), respondent appeared before a federal magistrate in the Northern District of California on the outstanding bench warrant and requested a continuance until March 8 (E.R. 43, 74-81). On March 8, the magistrate, at respondent's request, ordered a physical and psychiatric examination of respondent (E.R. 43, 86-87). At the March 8 hearing, defense counsel also informed the court that he was in no hurry to return respondent to Washington (E.R. 85):

> I assume that we are going to return, Your Honor. What I propose is we set a removal hearing[.] * * * I would not take the Court's time to have a removal hearing, but I would rather keep him here and organize what is gonna happen and talk to [Assistant U.S. Attorney] Wales up in Seattle.

The court scheduled a status conference on the removal hearing for March 18 (E.R. 86). On that date, at respondent's request, the hearing was set for April 3 (E.R. 88-89).[2] At the time set for the hearing, respondent waived the

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[1] "E.R." refers to the Excerpt of Record filed in the court of appeals. It contains the pleadings, exhibits, and affidavits on which the district court based its ruling on the speedy trial motion. There was no hearing on that motion.

[2] The only issue at that hearing would be whether respondent was the individual named in the warrant. Fed. R. Civ. P. 40.

removal hearing and was ordered removed to the Western District of Washington (E.R. 52, 56, 60-61).

Over the next 14 days, the marshal, in accordance with standard procedures, assembled several prisoners who had to travel northward (E.R. 43, 52-53). On April 17, 1985, respondent began his trip to Washington. The following day, while respondent was in Oregon, the district court in the Northern District of California issued a second writ of habeas corpus ad testificandum, compelling respondent's presence at the retrial in the *Seigert* case. While respondent was waiting to testify in that case, a superseding indictment was returned on April 24 in the Western District of Washington. The superseding indictment added to the two narcotics counts a third count charging respondent with failing to appear before a court as required, in violation of 18 U.S.C. 3150. E.R. 3-5. The *Seigert* retrial began on May 7, 1985. Respondent was returned to the Western District of Washington on May 17, 1985 (E.R. 44, 43). Before he could be retried, he moved to dismiss the superseding indictment, asserting a violation of the Speedy Trial Act's 70-day time limitation.

2. The district court granted respondent's speedy trial motion and dismissed the two counts charging respondent with narcotics offenses (App., *infra*, 23a-33a).[3] The court found that only one day remained on the speedy trial clock when respondent failed to appear at trial in November 1984. Accordingly, the court held, the government had only one day of non-excludable time within which to bring respondent to trial following his capture on February 7, 1985.

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[3] The court's determination that the Act had been violated applied only to the two cocaine counts, which had been charged in the original indictment. The court found no speedy trial violation with respect to the failure to appear count that was added in the superseding indictment. App., *infra*, 32a-33a. Respondent subsequently pleaded guilty to that count.

In calculating the speedy trial time that had expired before trial began, the court excluded the 78-day period between respondent's November trial date and his capture in February as time during which the respondent was "absent" under Section 3161(h)(3)(A) of the Act. The court also excluded the delay between February 7 and February 22 as delay attributable to the pending state charges and respondent's appearance at the first trial in the *Seigert* case. But the court found that the speedy trial clock began to run on February 23, the day after the first *Seigert* trial ended. The court counted the seven days through and including March 1, even though the state charges were still pending at that time, because the United States Marshals Service had not returned respondent, who was housed in the San Francisco jail, to the formal custody of the state authorities. In addition, the court counted the next five days as non-excludable time for speedy trial purposes. The court concluded that once the marshal learned on March 1 that the state charges had been dismissed, the marshal should have brought respondent before a federal magistrate immediately for an initial appearance on the bench warrant. See Fed. R. Crim. P. 40(a). Because the marshal did not do so until March 6, the court refused to exclude the preceding five-day period.

Applying Section 3161(h)(1)(G), the district court excluded the entire period between respondent's initial appearance on the bench warrant on March 6 and the removal order on April 3 as delay resulting from the removal proceedings. The court excluded the next ten days as a reasonable period of time for transporting respondent back to Washington, under Section 3161(h)(1)(H). The court, however, refused to exclude the full 14 days that it took the marshal to arrange for respondent's transportation back to Washington. In the district court's view, the marshal had improperly elevated his concern for the economies resulting from group transportation over respondent's right to a speedy trial. Finally, the court ex-

cluded all the remaining delay as resulting from the second writ of habeas corpus ad prosequendum in the *Seigert* case and respondent's second journey to Washington.

In accordance with its tabulation of the speedy trial time, the court concluded that a total of 15 non-excludable days had elapsed since respondent's apprehension. Because the parties agreed that there was only one day left on the speedy trial clock when respondent absconded, the court found that the 70-day limit of the Act had been exceeded by 14 days and that the indictment therefore had to be dismissed.[4]

The district court then considered whether to dismiss the indictment with or without prejudice. The court acknowledged that the offenses at issue were serious, but it held that the circumstances leading to the Speedy Trial Act violation tended "strongly to support the conclusion that the dismissal must be with prejudice" (App., *infra*, 30a). The court characterized the government's behavior after

[4] The conclusion reached by the court and the parties that there was only one day left for trial as of November 19, 1984, was based on a now-outmoded method of calculating speedy trial time. Under that method, which was recommended by the Judicial Conference's *Guidelines to the Administration of the Speedy Trial Act of 1974, as amended* 68-70 (rev. Dec. 1979 (with amendments through Oct. 1984)), an "ends of justice" continuance granted under Section 3161(h)(8) would be "tacked on" to the end of the 70-day limitation period; it would not stop the running of the speedy trial clock at the time the continuance was granted. Therefore, when the continuance ended, the speedy trial period would expire as well. It is now clear that that is not the correct method for calculating speedy trial time. Instead, the courts that have analyzed the issue have held that the grant of a continuance stops the speedy trial clock altogether until the continuance comes to an end. Under that method of calculation, there would have been 42 days of speedy trial time left at the time respondent became a fugitive, so that there would have been no speedy trial violation in this case. See, *e.g.*, *United States* v. *Gallardo*, 773 F.2d 1496 (9th Cir. 1985); *United States* v. *Campbell*, 706 F.2d 1138 (11th Cir. 1983). We did not raise that argument in the courts below and we do not press it here.

respondent's recapture as "lackadaisical" (*ibid.*), pointing to the failure to return respondent to state custody after his first appearance in *Seigert*, the five-day interval between the notice of the dismissal of the state charges and respondent's appearance on the bench warrant, and the 14-day period after the removal order before respondent was sent to Washington (*ibid.*). Based on the government's conduct, the court concluded that the indictment had to be dismissed with prejudice, or else "the [Speedy Trial Act] would become a hollow guarantee" (App., *infra*, 31a).

3. In a divided opinion, the court of appeals affirmed the dismissal of the indictment with prejudice (App., *infra*, 1a-22a). The court of appeals agreed with the district court that the Act's 70-day limit had been exceeded by 14 days (*id.* at 16a). The court also upheld the district court's decision to dismiss the indictment with prejudice. It looked at the factors enumerated in Section 3162(a)(2) and acknowledged that several of those factors favored dismissal without prejudice. For instance, the court agreed with the district court that the offenses were serious. The court also conceded that the length of the delay was "not so great as to mandate dismissal with prejudice" (App., *infra*, 17a). And the court found "no indication" that the delay had impaired respondent's defense. Nonetheless, the court asserted that respondent had suffered prejudice in that he was incarcerated during the entire period (*ibid.*). Moreover, the court concluded that the purpose of the district court's order was to send "a strong message to the government" that the Speedy Trial Act "must be observed despite the government's apparent antipathy toward a recaptured fugitive" (*id.* at 18a). For that reason, the court concluded that the district court had not abused its discretion by entering a "with prejudice" dismissal.

Judge Poole dissented on the remedy issue, concluding that the district court had abused its discretion by dismissing the indictment with prejudice (App., *infra*, 19a). Judge Poole found that the government was not at fault for the delay prior to March 1, when the marshal learned that the

state charges had been dismissed.[5] Noting that the marshal had learned about the dismissal of the state charges on a Friday, Judge Poole further concluded that the marshal could not be charged with neglect for not bringing respondent before a magistrate until the following Wednesday (App., *infra*, 21a). Judge Poole also explained (*id.* at 21a-22a) that it took the marshal 14 days rather than 10 days to transport respondent back to Washington after his removal hearing because of the delay necessary "to collect a larger number of prisoners for simultaneous transport in order to effect economy of expenses."

In light of these considerations, Judge Poole concluded that the delay in the case, although non-excludable under the statute, was not "of such studied, deliberate, and callous nature as to justify dismissal with prejudice" (App., *infra*, 22a). Judge Poole further found it incongruous that by fleeing the day before his scheduled trial, respondent became "the instrument of his own deliverance" (*ibid.*). As Judge Poole explained, respondent "created his own 78-day 'excludable time' by his own will, traveling from Seattle to California where he became the subject of criminal charges in two jurisdictions 800 miles away from the place of trial." Judge Poole found it "ironic that the statutory scheme which would have assured his orderly trial in November 1984, is resorted to, five months later, as the reason for 'springing' him to freedom and conferring upon him complete absolution from further prosecution" (*ibid.*). To release respondent

[5] Judge Poole observed that the San Mateo authorities could have obtained custody of respondent, who was incarcerated during and after the *Seigert* trial in the San Francisco County jail, simply by asking the marshal to sign off on the required papers. Furthermore, Judge Poole concluded that the government could not be faulted for failing to return respondent to Washington during that period, since the California state charges were still pending at that time. App., *infra*, 20a-21a.

altogether because of the minor violation of the Speedy Trial Act, Judge Poole concluded, "reflects badly upon our notions of sound, evenhanded administration of justice" (*ibid.*).

REASONS FOR GRANTING THE PETITION

The court of appeals believed that dismissal with prejudice was justified to teach the government a lesson about the speedy trial rights of fugitives (App., *infra*, 18a). But the decision below also contains lessons for others that are entirely inconsistent with the purposes of the Speedy Trial Act. The decision instructs defendants that the Act can be used as a tool to convert flight into complete immunity from prosecution; it instructs trial courts that they may dismiss a case with prejudice whenever it seems appropriate to them; and it instructs appellate courts that the decision of a district court to dismiss a case with prejudice is practically unreviewable. In addition to misapplying the Speedy Trial Act and ignoring the intent of Congress, the decision in this case conflicts with the rationale of decisions in several other circuits. Review of the decision is accordingly needed to provide guidance to the lower courts in construing Section 3162(a), the sanctions provision of the Act.

a. When the 70-day time limit of the Speedy Trial Act is violated, the indictment must be dismissed.[6] 18 U.S.C. 3162(a). When such a dismissal is entered, the district court must determine whether the government may reindict the defendant and begin the prosecution anew. 18 U.S.C. 3162(a)(2). The Act directs that in making that

[6] Section 3161(c)(1) requires that trial commence within "70 days of the latest of a defendant's indictment, information, or appearance, barring periods of excludable delay." *Henderson* v. *United States*, No. 84-1744 (May 19, 1986), slip op. 5.

determination, the district court must balance several factors, including the seriousness of the offense, the facts and circumstances leading to the dismissal, and the impact of a reprosecution on the administration of the Speedy Trial Act and on the administration of justice (*ibid.*). Balancing those factors requires the district court to exercise its discretion; the court cannot arbitrarily ignore the direction in which the scale tips. In this case, the statutory factors overwhelmingly favor dismissal without prejudice. Accordingly, the district court was not free to disregard the statutory balancing test simply in order to teach the government a lesson about the speedy trial rights of fugitives. Cf. *United States* v. *Morrison*, 449 U.S. 361, 364 (1981) ("remedies should be tailored to the injury suffered * * * and should not unnecessarily infringe on competing interests"). In practical effect, by barring reindictment in this case ostensibly to prevent the Speedy Trial Act from becoming "a hollow guarantee" (App., *infra*, 31a), the district court read into the Act a strong presumption in favor of dismissal with prejudice. In doing so, the court violated the mandate of Congress.

In 1974, when the Speedy Trial Act was enacted, the dismissal sanction was its most controversial and hotly debated provision. See 120 Cong. Rec. 41773-41774 (1974) (remarks of Rep. Conyers, introducing bill); A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, at 193-222 (Fed. Judicial Center 1980) [hereinafter Partridge]. The House bill, H.R. 17409, 93d Cong., 2d Sess. § 101 (1974), reprinted in Partridge at 345, provided that a speedy trial dismissal "shall forever bar prosecution of the individual for the offense or any offense based on the same conduct." The Senate bill was nearly as stringent. It permitted reindictment only where "the attorney for the government has presented compelling evidence that the delay was caused by exceptional circumstances." S. 754, 93d Cong., 2d Sess. § 101 (1974), reprinted in Partridge at 318.

Congress, however, was unwilling to pass either bill with those harsh sanctions. 120 Cong. Rec. 41778 (1974) (remarks of Rep. Wiggins, explaining bill's provisions); *id.* at 41794 (remarks of Rep. Conyers). Consequently, during the House floor debates, an amendment was proposed and adopted that modified the sanctions provision of the bill (*id.* at 41774-41775, 41778, 41793-41794). The amendment gave the district court two options upon finding a speedy trial violation: dismissal with or without prejudice. To determine which option was appropriate, the amendment "require[d] consideration of several factors by the court." *Id.* at 41778 (remarks of Rep. Wiggins); accord *id.* at 41794 (remarks of Rep. Dennis). As Congressman Wiggins, one of the amendment's sponsors, explained (*id.* at 41778):

> No factor, nor combination of factors, requires, however, a particular form of dismissal. In most cases it is to be expected that no dismissal with prejudice will be ordered unless actual prejudice to the defendant can be shown occasioned by the further delay implicit in a refiling in the case against him, and that the actual prejudice to the defendant outweighs societal interests in prosecuting the alleged offender.

The amendment was adopted without further modification. *Id.* at 41619, 41796.

The legislative history of the Speedy Trial Act thus confirms that there is no presumption in favor of dismissals with prejudice. See *United States* v. *Salgado-Hernandez*, 790 F.2d 1265, 1267 (5th Cir.), cert. denied, No. 86-5229 (Nov. 17, 1986); *United States* v. *Brown*, 770 F.2d 241, 244 (1st Cir. 1985), cert. denied, 474 U.S. 1064 (1986); *United States* v. *Caparella*, 716 F.2d 976, 978-980 (2d Cir. 1983). On the contrary, the premise of the amendment to the sanctions provision of the Act was that dismissals without prejudice would be an adequate sanction for most statutory speedy trial violations. Moreover, the legislative history of that amendment shows that Congress intended

the district courts to perform the balancing test set forth in Section 3162(a)(2) in selecting a sanction. Finally, the contemporaneous explanations of the amendment by its sponsors make clear that Congress intended to permit reprosecution where the offense was serious and the defendant was not prejudiced by the speedy trial violation.[7]

b. We do not challenge the district court's ruling that the Speedy Trial Act was violated in this case.[8] Dismissal

[7] Five years later, Congress suspended the implementation of the dismissal sanction for one year. 18 U.S.C. 3163(c); Pub. L. No. 93-619, § 101, 88 Stat. 2080 (codified at 18 U.S.C. 3163). In discussing this suspension, the House Report stated in passing:

> While the act does permit dismissal without prejudice, extensive use of this procedure could undermine the effectiveness of the act and prejudice defendants, and the committee intends and expects that use of dismissal without prejudice will be the exception and not the rule.

H.R. Rep. 96-390, 96th Cong., 1st Sess. 8-9 (1979). Because Congress was not at that time considering a modification to Section 3162(a)(2), that observation, made five years after the enactment of that provision, is not entitled to much weight. It cannot override the contrary contemporaneous legislative history from 1974 that led to the enactment of the sanctions provision as it exists today. In 1974, Congress specifically rejected the Senate bill, which limited reprosecution to exceptional cases.

[8] The courts below identified three periods of non-excludable delay: the six days between the conclusion of the first *Seigert* trial and the day on which the state charges were dismissed; the six days between the date on which the federal marshals were notified of that dismissal and the date on which respondent was taken before a federal magistrate on the outstanding bench warrant; and the four days of extra travel time on the first attempt to return respondent to Washington. We believe that the courts erred in refusing to exclude the period between the conclusion of the first *Seigert* trial (February 22) and the day on which the state charges were dismissed (February 28). The Speedy Trial Act does not require the marshal to interfere with state proceedings. Accordingly, he was under no obligation to return respondent to Washington before the state charges were dropped. 18 U.S.C. 3161(h)(1)(D); *United States* v. *Bigler*, 810 F.2d

of the indictment was therefore appropriate. We do, however, contend that when the factors comprising the

1317, 1320-1321 (5th Cir. 1987); *United States* v. *Redmond*, 803 F.2d 438, 440 (9th Cir. 1986); *United States* v. *O'Bryant*, 775 F.2d 1528, 1532 (11th Cir. 1985); *United States* v. *Rodriguez-Franco*, 749 F.2d 1555, 1559 n.2 (11th Cir. 1985); *United States* v. *Lopez-Espindola*, 632 F.2d 107, 109-111 (9th Cir. 1980); *United States* v. *Goodwin*, 612 F.2d 1103, 1105 (8th Cir. 1980). The district court did not suggest that the marshal should have returned respondent to Washington during that period. The court, however, faulted the marshal for not moving respondent from the San Francisco County jail to the county jail in neighboring San Mateo County, where the state charges were pending. But such a move was unnecessary and should have no effect on the speedy trial calculations. The sheriff in San Francisco was under court order to deliver respondent to San Mateo authorities upon request. E.R. 20. The marshal's failure to move respondent to San Mateo County in no way impeded the State's ability to prosecute respondent on the local charges.

We do not dispute the district court's conclusion that the other two periods were not excludable. Although the marshal learned at some time on Friday, March 1, that the outstanding state charges had been dismissed, respondent was not taken before a federal magistrate for an initial appearance on the outstanding bench warrant until the following Wednesday, March 6. The district court counted that period as constituting a five-day delay for speedy trial purposes. Second, Section 3161(h)(1)(H) of the Act establishes the presumption that any transportation time in excess of 10 days is unreasonable, and the marshal did not arrange for respondent's transportation to Washington after the first *Seigert* trial until 14 days after the removal order. Although we believe that in an appropriate case the presumption can be rebutted by showing that the extra time taken was justified by economic or security considerations, we do not contend that such a showing was made here. Accordingly, because the marshal took four more days than the Act generally allows to return the fugitive respondent to the charging district, we do not challenge the decision of the lower courts to count those four days. We therefore acknowledge that nine speedy trial days elapsed after respondent's capture. When added to the 69 days that the parties agreed had elapsed before respondent absconded, the 70-day limit of the Act was exceeded by eight days.

mandatory balancing test are weighed, the scale tips heavily in favor of dismissal without prejudice.

The first factor in the test is the seriousness of the offense. As both courts below agreed, conspiracy to distribute cocaine and possession of cocaine with the intent to distribute it are serious crimes. See also *United States* v. *May*, 819 F.2d 531, 535 (5th Cir. 1987); *United States* v. *Simmons*, 786 F.2d 479, 485 (1986), rev'd on other grounds on rehearing, 812 F.2d 818 (2d Cir. 1987); *United States* v. *Brown*, 770 F.2d at 244; *United States* v. *Carreon*, 626 F.2d 528, 533-534 (7th Cir. 1980). The courts of appeals have held that where the the offense is serious, the indictment should be dismissed with prejudice only for a "correspondingly serious" delay in violation of the Act. *United States* v. *Salgado-Hernandez*, 790 F.2d at 1268; *United States* v. *Simmons*, *supra*; *United States* v. *Phillips*, 775 F.2d 1454, 1455-1456 (11th Cir. 1985); *United States* v. *Hawthorne*, 705 F.2d 258, 260-261 (7th Cir. 1983); *United States* v. *Carreon*, *supra*. Here, however, the delay in our view was eight days, and even in the district court's view it was only 14 days. That period of delay is not "correspondingly serious." See, *e.g.*, *United States* v. *Brown*, *supra* (35-day delay not serious); *United States* v. *Hawthorne*, *supra* (9-day delay not serious); *United States* v. *Melguizo*, No. 87-2198 (5th Cir. Aug. 4, 1987) (same); *United States* v. *Bittle*, 699 F.2d 1201, 1208 (D.C. Cir. 1983) (13-day delay not serious). Compare *United States* v. *Stayton*, 791 F.2d 17, 21-22 (2d Cir. 1986) (23-month delay serious); *United States* v. *Russo*, 741 F.2d 1264, 1267 (11th Cir. 1984) (several-month delay serious). As the Seventh Circuit has noted, where Congress has provided for alternative sanctions, "the purpose of the Act would not be served by requiring the court to impose the maximun sanction for a minimum violation." *United States* v. *Hawthorne*, 705 F.2d at 261. Hence, the first factor in the balancing test strongly favors dismissal without prejudice.

The second factor—the circumstances that led to the dismissal—also strongly favors dismissal without prejudice. The delays here were not attributable to any intentional government misconduct or even any negligence that prejudiced respondent in any way.[9] Cf. *United States* v. *Loud Hawk*, No. 84-1361 (Jan. 21, 1986), slip op. 12-13. Moreover, any delay in the ultimate date of respondent's trial resulted from respondent's failure to appear on the scheduled day of trial. The government was prepared to go to trial, as scheduled, on November 19, 1984. The government did nothing to postpone that trial date. Respondent, however, was obviously less interested in speedy justice. Rather than submit to the jurisdiction of the court for a swift adjudication of his guilt or innocence, respondent fled, thereby postponing the proceedings indefinitely. It was respondent's fault that the marshal was called in, upon respondent's capture by state authorities, to undo what respondent had done, namely, to return respondent to the site of the trial. For purposes of this case, we do not dispute that the marshal was slower in performing this task than the Speedy Trial Act permits. But it was respondent—not the marshal—who was principally responsible for

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[9] It is reasonably clear that the eight-day period that constituted the violation in this case did not have the effect of delaying respondent's trial date. Respondent was returned to California to testify at the *Seigert* retrial on April 18. Even absent the delay in initiating the removal proceedings and in taking him from California after the removal order, it is unlikely that respondent would have arrived in Washington before early April. And it is highly unlikely that respondent's trial could have been held during the period between his return to Washington and April 18, when the district court ordered him returned to California, particularly since respondent's counsel was heavily involved in the *Seigert* case. The government and defense counsel would surely have sought, and been granted, a continuance of respondent's trial under Section 3161(h)(3)(B)(8) of the Speedy Trial Act until after the completion of the *Seigert* trial.

the loss of his opportunity for a speedy trial. And it was respondent, not the marshal, who violated the public's right to speedy justice by his flight from prosecution. A defendant who deliberately delays his trial should rarely, if ever, be entitled to the ultimate, irrevocable sanction of dismissal with prejudice. *United States* v. *Peeples*, 811 F.2d 849, 851 (5th Cir. 1987); *United States* v. *McAfee*, 780 F.2d 143, 146 (1985), vacated on other grounds, No. 85-1959 (Oct. 6, 1986), on remand, 808 F.2d 862 (1st Cir. 1986). Cf. *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970) (flight "disentitles the defendant to call upon the resources of the Court for a determination of his claims"). As the dissenting judge below observed, the Speedy Trial Act should not be interpreted to let a defendant "be the instrument of his own deliverance" (App., *infra*, 22a).

Although Section 3162(a) does not explicitly state that prejudice to the defendant is one of the factors in the balancing test, the legislative history of the Act makes it clear that Congress intended that prejudice would be a circumstance to be weighed in the balance. 120 Cong. Rec. 41778, 41794-41795 (1974).[10] The courts of appeals agree. *United States* v. *Peeples*, *supra*; *United States* v. *Phillips*, *supra*; *United States* v. *Brown*, *supra*; *United States* v. *Bittle*, *supra*; *United States* v. *Carreon*, *supra*. Respondent has never claimed that his ability to defend against the charges has been impaired by the delay in returning him to Washington for trial.[11] See *United States* v. *Loud Hawk*,

[10] As the legislative history explains, Congress chose not to list prejudice as a factor for fear that it would become the dispositive factor in every case. Nevertheless, every Congressman to address the question of prejudice during the debates expressed the view that prejudice should play an important role in the overall balancing test. 120 Cong. Rec. 41778, 41794-41795 (1974) (remarks of Reps. Dennis, Wiggins, Cohen, and Conyers).

[11] Indeed, respondent consistently showed by his actions that he did not object to delays. He not only deliberately delayed trial by absconding; even after his recapture, respondent showed no interest in a prompt return to Washington for trial. Although he now complains that he was not brought before a federal magistrate on the bench warrant until the Wednesday following the Friday on which the marshal was notified of the dismissal of the state charges, he made it clear at the time that he was quite ready to postpone the completion of the removal procedures. It was largely because of delays sought by respondent, including his refusal to waive the formality of an identification hearing until the day scheduled for it, that these proceedings were not completed for almost a month.

slip op. 12 ("[D]elay is a two-edged sword. It is the government that bears the burden of proving its case beyond a reasonable doubt. The passage of time may make it difficult or impossible for the government to carry this burden."). The court of appeals nevertheless found that respondent suffered prejudice because he was incarcerated during the period of the delay. During that period, however, respondent was lawfully incarcerated because of his failure to appear for trial in November 1984. The speedy trial violation on the narcotics charges was therefore not the cause of his being held in custody during that period. For that reason, the court of appeals erred in considering incarceration as a form of prejudice in this case. See *United States* v. *Salgado-Hernandez*, 790 F.2d at 1268-1269. In sum, the circumstances of this case, including the absence of actual prejudice, indicate that the second factor in the balancing test favors a dismissal without prejudice.

Finally, by the terms of Section 3162(a), the courts are required to consider "the impact of a reprosecution on the administration of this chapter and on the administration of justice." A reprosecution in this case would serve the administration of justice in two ways. First, it would send a message to defendants that they will not profit by absconding. They cannot flout the public's right to speedy justice and expect to gain complete absolution when their

flight precipitates a technical violation of the Act.[12] Second, a reprosecution would serve the public's interest in seeing that narcotics offenders are justly punished. See *Barker* v. *Wingo*, 407 U.S. 514, 519-521 (1972); cf. *Arizona* v. *Washington*, 434 U.S. 497, 505 (1978).

The only statutory factor that could be regarded as cutting in respondent's favor is the effect of a reprosecution on the administration of the Speedy Trial Act. Complete absolution is more likely than a dismissal without prejudice to lead to modifications in procedures that will assure more rapid pretrial processing. In one sense, of course, that factor will always weigh in favor of dismissal with prejudice: by increasing the penalty for noncompliance, compliance is always encouraged. Yet by providing for dismissal without prejudice in many cases, Congress indicated that it did not believe the drastic sanction of dismissal with prejudice would always be necessary or appropriate to induce compliance with the Act. Contrary to the assumption of the courts below (App., *infra*, 17a-18a, 30a-31a), dismissal without prejudice is not a toothless sanction, and should suffice in many cases to encourage modifications in procedures. When a dismissal is ordered after trial or on appeal, the case must be retried. Even when the dismissal occurs before trial, the government must begin its case over again by resubmitting the case to a grand jury and by running the risk that the statute of limitations may have expired in the meantime. Thus, the district court's conclusion that a dismissal without prejudice would make the Act a "hollow guarantee" (App., *infra*, 30a-31a) is contrary to both the judgment of Congress and the realities of criminal practice.

[12] It is no answer to say, as did the court of appeals (Pet. App. 10a-11a), that defendants who abscond are still subject to prosecution for absconding. As long as the maximum sentence for failure to appear is lower than the maximum total sentence on all the charges from which the defendant is fleeing—as was the case here—the defendant will have an incentive to abscond if he is reasonably sure that if he is captured the government will not be able to return him and arrange for his trial within the remaining speedy trial time.

When all the factors are weighed, the scale tips overwhelmingly in favor of dismissal without prejudice. In these circumstances, the district court cannot ignore the balancing test and select instead the maximum remedy under the guise of exercising its discretion. See *United States* v. *Kramer*, No. 86-5217 (8th Cir. Aug. 17, 1987) (reversing dismissal with prejudice as an abuse of discretion); *United States* v. *Phillips*, 775 F.2d at 1455-1456 (same). Although the trial court retains discretion in a case where the factors are closely balanced, this discretion is not unfettered. The court must apply the guidelines imposed by Congress. As the court of appeals explained in *Kramer*, slip op. 10:

> An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment.

Here, the district court did not give sufficient weight to the seriousness of the offense, the brevity of the delay, the lack of prejudice, and the role of respondent's flight in precipitating the violation. The court made a clear error in judgment when it dismissed these factors as secondary to the need to teach the government a lesson about the speedy trial rights of fugitives. In so doing, the court exceeded its authority under the Act.

c. In affirming the "with prejudice" dismissal, the court of appeals failed to follow the principles enunciated in other circuits for determining the appropriate sanction. For instance, as we have noted, the decision in this case is contrary to the decisions of other courts that have held that where the offense is serious, the indictment should be

dismissed with prejudice only for a correspondingly serious delay. See, *e.g.*, *United States* v. *Simmons, supra; United States* v. *Salgado-Hernandez, supra; United States* v. *Hawthorne, supra; United States* v. *Carreon, supra; United States* v. *Phillips, supra.*

Likewise, the decision in this case is contrary to decisions of the First and Fifth Circuits, which have refused to grant the maximum sanction to a defendant who is in some way responsible for the delay. *United States* v. *McAfee, supra; United States* v. *Peeples,* 811 F.2d at 852. Cf. *United States* v. *Snowden,* 735 F.2d 1310, 1313 (11th Cir. 1984). And, the decision of the court below is at odds with decisions of the Eighth and Eleventh Circuits (*United States* v. *Kramer, supra,* and *United States* v. *Phillips, supra),* because it gives the district court unchecked discretion to choose a remedy without regard to the outcome of the statutorily mandated balancing test. See also *United States* v. *Tunnessen,* 763 F.2d 74, 79-80 (2d Cir. 1985). As both *Kramer* and *Phillips* hold, the factors set forth in Section 3162(a)(2) may not be ignored, and even when the district court purports to consider those factors, a serious misapplication of the factors requires correction by an appellate court. Review by this Court is warranted to resolve these disagreements regarding the proper application of the Speedy Trial Act dismissal sanction.

Justice is generally served when a criminal case is resolved on the basis of the defendant's guilt or innocence. Here, the lower courts have given respondent his freedom without such a determination. There was no constitutional violation in this case; there was no egregious behavior on the part of the government; and there was no intentional disregard of respondent's statutory speedy trial rights. At worst, there was an inadvertent, technical violation of the Act by the marshal. Dismissal of the indictment without prejudice is more than adequate to deter such mistakes in the future. Complete absolution, on the other hand, is a

remedy totally disproportionate to the injury suffered or the need to enforce compliance with the Act, and it is a penalty that society should not be forced to suffer.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1987

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-3127

UNITED STATES OF AMERICA, PLAINTIFF/APPELLANT

v.

LARRY LEE TAYLOR, DEFENDANT/APPELLEE

On Appeal from the United States District Court
for the Western District of Washington—
Barbara J. Rothstein, United States District Judge,
Presiding

Argued and Submitted
August 4, 1986—Seattle, Washington

Filed July 13, 1987

OPINION

Before: Cecil F. Poole, William A. Norris and
Robert R. Beezer, Circuit Judges.

Opinion by Judge Beezer; Partial Concurrence and
Partial Dissent by Judge Poole

BEEZER, Circuit Judge:

The United States appeals from the district court's dismissal with prejudice, under the Speedy Trial Act ("STA"), 18 U.S.C. §§ 3161-3174, of its superseding indictment charging defendant Larry Lee Taylor with con-

spiracy to possess cocaine and possession with intent to distribute. The dismissal was granted based upon the government's violation of the STA's 70-day indictment-to-trial provision, 18 U.S.C. § 3161(c)(1).

The government contends the 70-day STA time "clock" should start over when a fugitive is apprehended after failing to appear for trial. The government also contends that the district court improperly computed the delays excludable under the STA. Finally, the government maintains that the district court abused its discretion in dismissing the indictment with prejudice. We affirm.

I

BACKGROUND

Larry Lee Taylor was indicted on July 25, 1984, for conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846, and for actual possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A), and 18 U.S.C. § 2. He was scheduled for trial on these criminal charges before the United States District Court for the Western District of Washington on November 19, 1984. Taylor failed to appear for trial and a fugitive bench warrant was issued. Taylor was apprehended in California on February 5, 1985, by officers of the San Mateo County sheriff's department.

After his arrest, Taylor was held in San Mateo County jail on both the federal bench warrant and a state bench warrant issued following Taylor's failure to appear for trial on a petty theft charge. The federal government obtained a superseding indictment on April 24, 1985.[1]

[1] The superseding indictment contained a third count, failure to appear for trial in violation of 18 U.S.C. § 3150 [now § 3146], to which Taylor pleaded guilty. The term "superseding indictment" refers to a second indictment issued in the absence of a dismissal of the original indictment. *United States v. Rojas-Contreras*, 474 U.S. 231 (1985).

Taylor was transferred from San Mateo County custody to federal custody on February 7, 1985, pursuant to a writ of habeas corpus ad testificandum issued by the United States District Court for the Northern District of California to obtain his testimony in another federal narcotics case, *United States v. Seigert*. He testified in the *Seigert* trial on February 21, and was held for possible recall in *Seigert* through February 22.

On February 28, the charges pending against Taylor in San Mateo County were dismissed, and the United States Marshal Service ("USMS") was notified on March 1 that local holds were released. On March 6, Taylor made an initial appearance on the federal fugitive warrant before a magistrate in the Northen District of California. On April 3, the magistrate signed an order directing that defendant be transported to the Western District of Washington.

On April 8, Taylor was transferred from San Francisco County Jail to Sutter County Jail while the USMS waited to assemble other prisoners for transport to Oregon and Washington rather than traveling with defendant alone. On April 17, Taylor was transported to Portland, Oregon, but the following day the United States District Court for the Northern District of California issued a second writ of habeas corpus ad testificandum ordering defendant returned to California for the retrial of *Seigert*. Taylor was returned to California on April 23, retrial began around May 7, and on May 17 he was transported to the Western District of Washington. On April 24, a grand jury in the Western District had returned a superseding indictment, adding a charge of failure to appear to the original narcotics charges.

After Taylor's return, the United States District Court for the Western District of Washington held that, since only one day had remained on the STA clock when trial was scheduled on November 19, 1984, and since the clock did not begin anew when defendant was arrested on February 5, the court had to examine the time which had

elapsed between his disappearance on November 19, 1984, and the issuance of the superseding indictment on April 24, 1985, to determine which delays were excludable under 18 U.S.C. § 3161(h). The court concluded that fifteen days of the delay were not excludable. Since the STA clock had expired fourteen days before Taylor was brought to trial, the district court dismissed the narcotics charges under the superseding indictment.

II

RESTARTING THE CLOCK

We review de novo the district court's interpretation of the provisions of the Speedy Trial Act. *United States v. Gallardo,* 773 F.2d 1496, 1501 (9th Cir. 1985); *United States v. Henderson,* 746 F.2d 619, 622 (9th Cir. 1984), *aff'd,* ____ U.S. ____, 106 S.Ct. 1871 (1986).

The STA, 18 U.S.C. § 3161(c)(1), "operates like a statute of limitations." *United States v. Mehrmanesh,* 652 F.2d 766, 769 (9th Cir. 1980). Pursuant to the statute, a defendant must be brought to trial within 70 days from the later of (1) the filing date of the information or indictment or (2) the date of his initial appearance before a judicial officer in the charging district. The STA provides numerous exclusions from this 70-day period. *See* 18 U.S.C. § 3161(h). But if the defendant is not brought to trial within the 70-day period plus the period allowed under the exclusion, the court must dismiss the indictment on motion of the defendant. 18 U.S.C. § 3162(a)(2).

The district court concluded that the time which elapsed between Taylor's failure to appear for trial on November 19, 1984, and his apprehension on February 5, 1985, was excludable under 18 U.S.C. § 3161(h)(3)(A), (B). This section provides:

> (h) The following periods of delay shall be excluded . . . in computing the time within which the trial of

> any such offense must commence:
>
> . . .
>
> 3(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.
>
> (B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obained by the due diligence or he resists appearing at or being returned for trial.

As applied under the facts of this case, section 3161(h)(3) clearly tolled the STA time "clock" for that period during which Taylor was a fugitive. However, upon his apprehension, the clock simply resumed from the point at which it was stopped by defendant's absence. In this case, there was one day remaining before Taylor was to be tried. According to the district court, fifteen days after Taylor's arrest were identified as unexcludable under STA. As a consequence, the government failed to comply with the statutory time period by fourteen days.

The United States contends that section 3161(h)(3) does not control under the circumstances of this case. The government instead argues that the clock should have been restarted on Taylor's apprehension, thereby giving the government an additional 70 days within which to bring Taylor to trial upon the superseding indictment.

Although the government failed to cite any authority for this proposition, we have discovered the following dicta in a footnote of an Eleventh Circuit decision:

> Appellant assumes, as do we, that where a defendant fails to appear for trial and is recaptured a year later

> and placed in federal custody, the Government has 70 days in which to try him for the offense for which he was originally charged. Requiring that the period during which a defendant is a fugitive be excluded from the original 70-day calculation would be unfair to the government, for if defendant became a fugitive 69 days after his initial appearance before a judicial officer, upon his recapture one year later, the Government would have only one day to try him for the original offense. We reject, however, the Government's argument that upon becoming a fugitive, a defendant waives his right to speedy trial upon recapture. Requiring that the 70-day period begin anew upon a defendant's recapture is the most reasonable result.

United States v. Studnicka, 777 F.2d 652, 657 n.16 (11th Cir. 1985).

However, all other courts which have considered the problem presented when a defendant had been at large for some period after the STA time clock had started, with the filing of an indictment or an initial appearance, have held that the delay occasioned by the defendant's absence should simply be excluded under section 3161(h)(3).[2] None of these decisions suggests that the clock should be restarted upon the defendant's apprehension.

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[2]*See, e.g., United States v. Greene,* 737 F.2d 572, 576 (6th Cir. 1984) (court excluded delay before arraignment which was occasioned by defendant leaving jurisdiction after indictment); *United States v. Mers,* 701 F.2d 1321, 1332 n.5 (11th Cir.) (exclusion of period while defendant was unavailable for trial not disputed), *cert. denied,* 464 U.S. 991(1983); *United States v. Stafford,* 697 F.2d 1368, 1374-75 (11th Cir. 1983)(delay caused by failure to appear at hearing excluded); *Hill v. Wainwright,* 617 F.2d 375, 378 (5th Cir.1980)(decided before effective date of STA sanctions); *United States v. Walters,* 591 F.2d 1195, 1201 (5th Cir.)(same), *cert. denied,* 442 U.S. 945 (1979); *United States v. Felton,* 592 F.Supp. 172, 184 (W.D.Pa.1984), *rev'd in part on other grounds,* 753 F.2d 256, 276

These holdings comport with the plain language of the STA. Since section 3161(h)(3) expressly provides a scheme for considering the effect of a defendant's absence or unavailability, we should not try to improve upon the statutory scheme by implying a provision restarting the clock upon apprehension of an absent defendant. Indeed, holding that the clock is to be restarted whenever a defendant is absent or unavailable would render section 3161(h)(3) meaningless. There could be no purpose in the exclusion of delays instigated by a defendant's absence or unavailability if the clock would instead be restarted upon his reappearance. We will not accept an interpretation of a statute which renders any part of the statutory scheme superfluous. *People of California v. Tahoe Regional Planning Agency,* 766 F.2d 1308, 1314 (9th Cir.), *amended,* 775 F.2d 998 (9th Cir. 1985).

Moreover, the legislative history of the STA indicates that Congress was aware of the potential problems in quickly bringing to trial a defendant who became a fugitive when the time clock was just about to expire. For example, in 1971, then Assistant Attorney General William H. Rehnquist suggested that the STA legislation include a special provision allowing additional time after a fugitive defendant has been apprehended:[3]

> Further, if a defendant is available for 58 days prior to trial, but then becomes a fugitive for two years,

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(3rd Cir. 1985); *United States v. Steinberg,* 478 F. Supp. 29, 33 (N.D.Ill.1979)(seven-year delay did not violate STA where defendant left country shortly before indictment); *see also United States v. Pena,* 793 F.2d 486, 488-90 (2d Cir.1986)(delay attributable to fugitive co-defendants excludable against defendant under § 3161(h)(7), as cases involving multiple defendants are governed by single STA clock); *United States v. Zielinski,* 519 F. Supp. 870, 872 (M.D. Pa. 1981)(construing both delay prior to capture of fugitive and short delay after return to charging district as excluded under § 3161(h)(3)(A)).

[3] Comments on S.895 in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, October 19, 1971, at 1971

> under section 3161(c)(3), upon his rearrest, the Government would only have two days to bring him to trial. This is obviously impossible since the evidence could not be reassembled on such short notice. We therefore believe that the terms "absence" and "unavailability" should be defined and that specific provisions should be made for situations where the defendant become a fugitive.

Deputy Attorney General Joseph T. Sneed also warned the Congress:[4]

> A defendant could "skip" bail on the 59th day of the time period and once apprehended, the Government would have 1 day within which to reassemble the evidence and to try him. This results in the anomalous situation of an escapee being given priority as to a trial date over those defendants who have abided by the conditions of their bail.

To address this perceived flaw in the legislation, the Justice Department proposed an amendment providing that a defendant who failed to appear for trial would be deemed arraigned only upon the date of his subsequent appearance before the court after his apprehension.[5] In effect, the amendment would have restarted the STA time clock when the fugitive defendant was brought before the

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Senate Hearings 254-55, *reprinted in* A. PARTRIDGE, LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974 at 120 (Fed. Judicial Center 1980)(hereinafter cited as "LEGISLATIVE HISTORY"). As is evident from the text, the statute as originally proposed had a 60-day limitations period.

[4] Testimony of Deputy Attorney General Joseph T. Sneed, 1973 Senate Hearings 114, *reprinted in* LEGISLATIVE HISTORY at 122.

[5] "Department of Justice Proposed Amendments to Title I of S. 895," Appendix to Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 262, *reprinted in* LEGISLATIVE HISTORY at 121.

court where the charge was pending.[6] The proposed amendment was not adopted.

Despite the fact that these concerns were raised, and alternative approaches suggested, Congress decided to address the problem of fugitive defendants through section 3161(h)(3) and excluded only that the period during which the defendant was missing.

As the district court ruled in this case, "The STA specifically provides that delay resulting from the unavailability of the defendant constitutes excludable time, § 3161(h)(3)(A), not that defendant's return to a district after flight and recapture starts the running of an entirely new 70-day period. If Congress had intended the latter result, it would have said so."

The United States argues that the clock should nevertheless begin anew when a fugitive defendant is apprehended because Congress intended that "if a climactic and unpredictable event occurs that disrupts the customary flow of a prosecution, the defendant is to be tried within seventy days of that event." The United States

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[6] Assistant Attorney General Rehnquist described the proposed amendment as making –

> provision for the situation where a defendant becomes a fugitive. We have alluded to the problem posed where the defendant becomes a fugitive near the end of the time period (e.g., on the 178th day), and is subsequently captured after a lengthy absence. In this case, S.895 would require that the Government try the defendant within the days under the 180-day limit which had not expired (e.g., 2 days). Obviously, it would be impossible for the Government to marshal the evidence on such short notice where only a few days remain upon re-apprehension of the defendant. Thus, the section contains a provision which allows a new time period to run in such cases.

Explanation of Proposed Amendments in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971 at 1971 Senate Hearings 259, *reprinted in* LEGISLATIVE HISTORY at 121-22.

attempts to analogize a defendant's flight from trial to sua sponte dismissal by the trial court, grant of a mistrial or new trial, and withdrawal of a plea of guilty or nolo contendere. The STA period is restarted with the occurrence of these latter events; the government contends it should also be restarted when a defendant fails to appear.

We reject this analogy because the STA specifically provides that the clock is restarted for withdrawal of a plea, 18 U.S.C. § 3161(i),[7] and declaration of mistrial or new trial, 18 U.S.C. § 3161(e).[8] Moreover, we recently held that a sua sponte dismissal by the trial court constitutes "a charge . . . dismissed or otherwise dropped" under section 3161(d), which provides that the clock be restarted under such circumstances. *United States v. Feldman,* 788 F.2d 544, 549 (9th Cir. 1986). By contrast, the statute does *not* allow restarting the clock when the defendant is unavailable, 18 U.S.C. § 3161(h)(3)(A), it only excludes such periods from the 70-day calculation.

Our holding today does not mean that a defendant will benefit by absconding from the trial court's jurisdiction just before the STA clock runs or trial is scheduled to begin. There remain substantial criminal sanctions which

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[7] Section 3161(i) provides:

> If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty of nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the pleas becomes final.

[8] Section 3161(e) provides:

> If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final.

attach to a defendant's failure to appear for trial. *See* 18 U.S.C. § 3146. Furthermore, if there is insufficient time remaining for effective trial preparation upon the fugitive defendant's apprehension, the district court retains the discretion to grant a continuance to serve the "ends of justice" under 18 U.S.C. § 3161(h)(8)(A). *See United States v. Kamer,* 781 F.2d 1380, 1389-90 (9th Cir.), *cert. denied,* 107 S. Ct. 80 (1986); *United States v. Gallardo,* 773 F.2d at 1505-06. In this case, the district court found that the STA clock had expired due to government delays before the defendant had even been returned to the Western Disrict of Washington. Consequently, no continuance could have been requested or granted.

Finally, although we hold that the plain language of the statute precludes an order to restart the clock upon the fugitive defendant's apprehension, the trial court may certainly take into account the defendant's culpable absence in deciding whether any resulting dismissal for violation of the STA should be with or without prejudice.

III

APPLICATION OF EXCLUSIONS

We now turn to the calculation of the number of nonexcludable days between the date of Taylor's arrest in California and the date upon which the United States District Court for the Western District of Washington granted the dismissal. We review de novo the district court's method of computing excludable days under the STA, and we review the factual findings underlying the STA determination under the "clear error" standard. *United States v. Gallardo,* 773 F.2d at 1501; *United States v. Henderson,* 746 F.2d at 622.

As explained above, the defendant concedes that the period of time between his flight on November 19, 1984, and his arrest on February 5, 1985, was excludable under

section 3161(h)(3)(A). The parties also concede that the short delay while Taylor was in state custody on February 6 and 7 was excludable; the delay attributable to removal proceedings between March 6 and April 3 was excludable under 18 U.S.C. § 3161(h)(1)(G); and the period during which Taylor was held for testimony in the Northern District of California, between February 7 and 22, and again between April 18 and 24, was excludable. Although the district court did not consider it, apparently it was assumed that the period after April was excludable because of the superseding indictment.

Two time periods are disputed, the eleven days between February 23 and March 5, and the fourteen days between April 4 and 17. Both are periods during which Taylor was in the custody of the United States Marshal Service. The district court concluded that fifteen of these days counted against the 70-day time clock.

Between February 23 and March 5, Taylor was still in custody in San Francisco following his testimony at the *United States v. Seigert* trial in the Northern District of California. The government contends that the six days between February 23 and February 28 should be excluded as processing time during which Taylor was effectively in state custody on a charge of petty theft. The district court properly rejected this argument. Although the San Francisco sheriff had been ordered to return Taylor to state custody in San Mateo, the USMS retained custody of Taylor in San Francisco. Consequently, we cannot regard these six days as tantamount to Taylor's having been in state custody on the pending petty theft charge. Moreover, this argument hardly accounts for the remaining five day delay between March 1, the day after the San Mateo County charges against Taylor were dropped, and March 5, the day before he was finally brought before a federal

magistrate in the Northern District of California on the federal bench warrant.[9]

The second disputed period of time began April 4, after the magistrate in California ordered Taylor's removal to the Western District of Washington, and ended April 17, the day before he was ordered returned from Portland, Oregon to testify again in the Northern District of California. The government contends this entire period should be excluded, arguing that when a defendant absconds and is apprehended in a distant jurisdiction, the USMS may consider matters of economy in arranging transportation back to the charging jurisdiction. In this instance, the USMS delayed Taylor's transportation to the Western District of Washington while it collected a larger number of prisoners to transport together.

The government's position in not supported by the statute. On the matter of transportation of defendants between jurisdictions, section 3161(h)(1)(H) of the STA is straightforward:

(h) The following periods of delay shall be excluded in

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[9] The government contends that, when a defendant is arrested outside the charging district, the government must be allotted a reasonable period of time within which to bring him before a magistrate to initiate removal proceedings. This argument may have merit, but it does not assist the government in this case. The government was not placed in the position of rushing the defendant from the site of his arrest to the nearest magistrate. In this case, Taylor had been in federal custody for fifteen days during the *Seigert* trial, and another eleven days afterward before he was brought before a magistrate. Had the government truly been solicitous of the requirements of the Speedy Trial Act, it could easily have arranged for removal proceedings to begin promptly upon completion of the *Seigert* trial testimony. Its failure to do so was yet another example of what the district court found was "lackadaisical behavior" on the government's part.

computing the time within which . . . the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to–

. . .

(H) delay resulting from transportation of any defendant from another district, . . . except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable . . . .

See also United States v. Greene, 783 F.2d 1364, 1368 (9th Cir.), *cert. denied*, ____ U.S. ____, 106 S. Ct. 2923 (1986).

Under 18 U.S.C. § 3161(h)(1)(H), the ten days from April 4 through April 13 were excludable. The remaining four days must be presumed unreasonable. The government failed to rebut the presumption that these additional days taken to transport Taylor to the Western District of Washington were not reasonable. Ten days is surely ample time within which to remove an individual from northern California to western Washington. The legislative history indicates that delays to accommodate the USMS, in its desire to effect economical transportation of prisoners in larger groups, are not excludable under the Act.[10]

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[10] In the House Report accompanying the Speedy Trial Act legislation, the committee expressly rejected the argument that additional time should be allowed to permit economical transportation of prisoners in larger groups:

> In addition, the Justice Department noted that other delays may also arise prior to arraignment in the charging district. As an example, the Department cites the difficulty in moving prisoners coming into the district from out-of-state. In this regard, Mr. Treece said:
>
> > For example, prisoners aren't moved immediately when ready because the marshals try to make their trips worthwhile by combining the movement of several prisoners. So it may take several weeks to get a prisoner from Florida to Colorado during which time he will be provided an attorney and perhaps have a hearing relative to his removal. [Hearings, p. 206.]
>
> The Committee cannot conclude that inconvenience to the United States marshals or the minimal expense of transporting prisoners is an excuse for delaying the arraignment of a defendant.

H.Rep.No.1508, 93d Cong., 2d Sess.(1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 7401, 7423-24. *See also* Testimony of James L. Treece and H. M. Ray, Members, Advisory Committee of U.S. Attorneys, 1974 House Hearings 211-13, *reprinted in* LEGISLATIVE HISTORY at 124-25.

The House Report discussion quoted above concerned the ten day indictment-to-arraignment requirement which was originally enacted in 1974 as part of 18 U.S.C. § 3161(c). Pub. L. No. 93-619, title I, § 101, 88 Stat. 2076, 2077 (1975). The 1979 amendments to the Speedy Trial Act merged this ten day indictment-to-arraignment requirement and the sixty day arraignment-to-trial limit into a single seventy day indictment-to-trial period. Pub. L. No 96-43, § 2, 93 Stat. 327 (1979). Accordingly, Congressional intent not to permit additional delays to accommodate the marshals during the original ten-day period before arraignment would now apply with full force to the larger seventy-day period.

Finally, the government contends that the entire period following Taylor's apprehension should be excluded if the government exercised "due diligence" in procuring his return to the charging jurisdiction. This "due diligence" requirement applies only in the context of an "unavailable defendant" under 18 U.S.C. § 3161(h)(3)(A), (B). Where the defendant's whereabouts are known, the government must exercise "due diligence" to secure his appearance at trial. If his appearance cannot be secured even through "due diligence," the defendant will be regarded as "unavailable" and any resulting delay is excludable from the STA time clock. 18 U.S.C. § 3161(h)(3)(A), (B). Consequently, the delays occurring while Taylor was in state custody, while he was being held to testify in the Northern District of California, and while he was resisting removal

from California to the Western District of Washington were excludable because Taylor was effectively "unavailable" during that period. The exclusion of these periods, however, is not at issue in this case.

During the two disputed periods, totaling fifteen days, Taylor was not "unavailable;" he was in the custody of the USMS, and within the full control of the federal government. The government simply failed to bring him promptly before a federal magistrate to initiate removal proceedings and to transport him to the charging jurisdiction within ten days after the removal order and that failure resulted in the delays which count against the 70-day time limit.

We affirm the district court's conclusion that fifteen days of non-excludable time elapsed after Taylor's apprehension. The 70-day clock was thus exceeded by fourteen days.

IV

DISMISSAL WITH PREJUDICE

The Speedy Trial Act provides that dismissal of the indictment upon motion of the defendant is mandatory when the 70-day statutory period is exceeded. 18 U.S.C. § 3162(a)(2). The dismissal may be with or without prejudice. In making this determination, the trial court is to consider, among others, the following factors: "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the STA] and on the administration of justice." *Id.*

We review the district court's decision to dismiss Taylor's indictment with prejudice for an abuse of discretion. *See United States v. Frey*, 735 F.2d 350, 353 (9th Cir.1984).

The district court recognized that the drug violations with which Taylor was charged were serious. The fourteen

day delay beyond the STA 70-day period, although not wholly insubstantial, was not so great as to mandate dismissal with prejudice. Although there is no indication that the delay would have prejudiced Taylor in preparing for trial, he did suffer prejudice in that he was incarcerated during the entire period.

In ordering dismissal with prejudice, the district court focused primarily upon the government's failure to bring Taylor promptly before a magistrate during the eleven days he was in federal custody following the *Seigert* trial, and the unreasonable delay by the USMS in transporting him to the Western District of Washington after the removal order was issued. The court decried the "government's lackadaisical behavior in this case," and the fact that the government "placed more value on accommodating the convenience of the USMS than in complying with the plain language of the STA."[11]

The court also held that "the administration of the STA and of justice would be seriously impaired if the court were not to respond sternly" to the violation. Under the circumstances, the district court found dismissal with prejudice was mandated because "if the government's behavior in this case were to be tacitly condoned by dismissing the

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[11] We recognize that other circuits have held that mere negligence or inadvertence on the part of the government, resulting in delay in bringing a defendant to trial, does not automatically mandate dismissal with prejudice, at least where other factors militate in favor of reprosecution. *United States v. Russo*, 741 F.2d 1264, 1267 (11th Cir. 1984); *United States v. Carreon*, 626 F.2d 528, 533 n.9 (7th Cir. 1980); *see also United States v. Hawthorne*, 705 F.2d 258, 261 (7th Cir. 1983)(dismissal under 18 U.S.C. § 3162(a)(1) for failure to file indictment with 30 days of arrest). However, the district court found the government's conduct in this case reflected an apparently bad faith "lackadaisical" attitude. The district court concluded that such an indifference toward the mandates of the Speedy Trial Act should not be tolerated.

indictment without prejudice, then the STA would become a hollow guarantee."

The purpose of the district court's order was to send a strong message to the government that the STA must be observed, despite the government's apparent antipathy toward a recaptured fugitive. Under the peculiar circumstances of this case, we see no need to disturb that ruling on appeal. The district court acted within the bounds of its discretion.

AFFIRMED.

POOLE, Circuit Judge, concurring in part and dissenting in part.

Concededly, the defendant was not brought to trial until 14 days beyond the time prescribed by the Speedy Trial Act, considering the period in which delay was excludable under 18 U.S.C. § 3161(h). Where a defendant is not brought to trial within 70 days from the date the indictment is returned or (in case of information) from the date of an initial appearance before a magistrate in the district of the prosecution, dismissal is mandatory. But the court has discretion, and is obligated, to determine whether the dismissal should be with or without prejudice. The district court dismissed the indictment (and with it the entire case against the defendant) with prejudice. I believe this was entirely uncalled for and constituted an abuse of allowable discretion.

Taylor was scheduled for trial on very serious charges of conspiracy to possess cocaine (21 U.S.C.§ 846) and for possession of cocaine with intent to distribute (21 U.S.C.§ 841(a)(1)), and for aiding and abetting (18 U.S.C.§ 2). He was to have been tried in Seattle, Western District of Washington, on November 19, 1984. He did not show up for trial and a fugitive warrant was issued. He successfully avoided capture for 78 days, until February 5, 1985, when he was taken into custody on state charges by the Sheriff of San Mateo County, California. Two days later the Sheriff delivered Taylor to the United States Marshal pursuant to an outstanding writ of habeas corpus ad testificandum which had been issued out of the United States District Court, Northern District of California, where his testimony was required in another narcotics prosecution, *United States v. Seigert*. Under that authority he was detained in federal custody through February 22, 1985. Thereafter, on February 28, the state charges upon which the Sheriff had arrested Taylor were dismissed, and on March 1 the Federal Marshal was informed that the

"holds" on Taylor were dismissed. As of that date Taylor was a fugitive in custody in the Northern District of California charged in a complaint under the Federal Fugitive Act with having fled from the Western District of Washington, Seattle. On April 3, a United States Magistrate entered an order directing the Marshal to transport Taylor back to Seattle. That Friday (April 5) began the Easter weekend and on Monday, April 8, Taylor was transferred from jail in San Francisco to Sutter County jail in Northern California. He remained there until April 17 while the Marshal assembled other prisoners for transport to the districts of Oregon and Washington. On April 17 Taylor arrived in Portland, but on the next day, April 18, the district court in San Francisco issued a second writ of habeas corpus ad testificandum requiring Taylor to be brought back to San Francisco for the second trial of defendant Seigert. He was returned to San Francisco on April 23 and was held there during the trial which began on May 7. On May 17 Taylor was returned to the Western District of Washington.

The district court concluded that the period of detention between February 23 and March 5, 1985 constituted 11 days of federal custody following Taylor's appearance in the *Seigert* trial, and rejected the government's contention that he had only been temporarily in federal custody for the 6 day period between February 23 and February 28 because be was to have been returned to state custody.

It is true that Taylor was not "effectively in state custody" during this time. A state court judge cannot "order" the United States Marshal to deliver a prisoner to the state court. However, all the San Mateo County authorities had to do in order to exercise state custody was to come to the San Francisco county jail with the required papers and take custody of the prisoner after notifying the United States Marshal, who would then "sign off." The record does not indicate why San Mateo did not physically transport Taylor across the county line from San Francisco to San Mateo. Under the circumstances, however, informed as it was of the state holds and that its custody of Taylor could be interrupted at any moment, the government cannot be found "lackadaisical" *see Maj. Op.* at 13 n.9, or irresponsible in not immediately having taking advantage of these few days of Taylor's presence to begin proceedings against him.

Furthermore, when on March 1 the Marshal was notified that the state petty theft charges against Taylor had been dismissed and the "local holds" should be released, there was another outstanding federal charge (violation of the Federal Fugitive Act) pending against Taylor. On March 6 he came before a federal magistrate for arraignment on that charge and for removal proceedings under Rule 40 of the Federal Rules of Criminal Procedure. The trial judge and majority find the period between March 1 and March 5 an unjustifiable delay necessitating dismissal with prejudice. *See* Maj. Op. at 13. This approach is likewise unduly harsh. March 1 was a Friday. We do not know at what time of day the Service was notified of the release of local holds on Taylor, but if it was in late afternoon, the ability to process and move Taylor before the following Monday, March 4, would be doubtful. For some reason not apparent in the record, Taylor could not be brought before the charging magistrate until Wednesday the 6th. If Taylor appeared on the morning of the day, the majority's rationale for dismissal with prejudice in this case would have been founded upon a mere 24-hour delay. The district court does not exercise the discretion of the statute in coming to such a Draconian result.

The other critical period of time was that which elapsed between the date of April 3 when the Magistrate signed the papers transferring Taylor back to Washington, and April 18 when he was ordered to return from Portland back to San Francisco. The majority has found that most of this delay occurred while the Marshal waited to collect a larger

number of prisoners for simultaneous transport in order to effect economy of expenses.

It seems clear to me that none of the delay shown in this case—although admittedly non-excludable under the statute—was of such studied, deliberate, and callous nature as to justify dismissal with prejudice. The Marshal was not indifferent to the duty to move prisoners as to invite the harsh sanction of dismissal with prejudice, barring forever a public trial of the defendant on very serious violations of the narcotics laws. Congress intended to give to district judges some substantial leeway in deciding how to treat delays in bringing a defendant to trial. This case presents the incongruous situation where a defendant can be the instrument of his own deliverance. Taylor fled the day before his scheduled trial. He created his own 78-day "excludable time" by his own will, traveling from Seattle to California where he became the subject of criminal charges in two jurisdictions 800 miles away from the place of trial. It is ironic that the statutory scheme which would have assured his orderly trial in November 1984, is resorted to, five months later, as the reason for "springing" him to freedom and conferring upon him complete absolution from further prosecution. The delay we review in this case—a few days—rises to no level of constitutional wrong. The majority says that in opening the door to freedom for this defendant, the trial judge sought "to send a strong message." The context of that message reflects badly upon our notions of sound, evenheaded administration of justice. Consequently, I write this dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C84-204R

UNITED STATES OF AMERICA, PLAINTIFF

v.

LARRY LEE TAYLOR, DEFENDANT

[Filed Aug. 1, 1985]

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS FOR SPEEDY TRIAL ACT VIOLATIONS

THIS MATTER comes before the court on a motion by defendant Taylor to dismiss all counts of the indictment pending against him on the grounds that the government violated the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* Having carefully reviewed defendant's motion together with all memoranda, affidavits and exhibits filed in support and in opposition to the motion, the court finds and rules as follows:

I. FACTUAL BACKGROUND

Unless otherwise noted, the following facts are undisputed: On November 19, 1984, defendant was scheduled to go to trial in this court pursuant to an indictment charging narcotics violations. When defendant failed to appear, this court issued a bench warrant for defendant's arrest. On February 5, 1985, defendant was arrested by officers of the Sheriff's Department on San Mateo County,

California. The government contends that defendant was arrested pursuant to both this court's warrant and to a bench warrant issued by Judge Edward Pliska of San Mateo County Municipal Court following defendant's failure to appear for a court date on pending petty theft charges. Defendant's attorney avers that the officers who participated in the arrest said they acted pursuant to a fugitive warrant out of Seattle. In any case, there is no dispute that defendant was booked into the San Mateo County Jail on February 5, 1985 in the custody of the San Mateo County authorities.

However, on February 7, 1985, the United States District Court for the Northern District of California issued a writ of habeas corpus ad testificandum because defendant was needed as a witness for the defense in a pending federal narcotics case, *United States v. Seigert*, CR84-689RFD. Pursuant to that writ, the United States Marshal Service ("USMS") took defendant into federal custody two days after his arrest. The trial in *Seigert* was then continued until February 20, 1985. Defendant remained in federal custody in the San Francisco Jail until he testified in *Seigert* on February 21, 1985. The USMS was then instructed to hold him for possible recall in the *Seigert* trial, which ended on February 22, 1985.

The government emphasizes that this period of federal custody was only temporary because defendant was still San Mateo County's prisoner and because the USMS had an obligation to return him to local custody. Be that as it may, defendant was never returned to San Mateo authorities after the end of the *Seigert* trial. In fact, according to defendant's attorney's affidavit, defendant remained in federal custody in the San Francisco County Jail even though San Mateo County Judge Pliska issued an order on February 20, 1985, requiring defendant's presence in his courtroom on February 28, 1985. Then, on March 1, 1985, the USMS received a teletype from the Sheriff at the San Mateo County Jail indicating that the

San Mateo case pending against defendant had been dismissed and that any existing local holds on defendant should be erased.

On March 6, 1985, defendant made an initial appearance before a United States Magistrate for the Northern District of California pursuant to the bench warrant issued by this court. On March 8, 1985, the magistrate ordered a physical examination of defendant. On April 3, 1985, at defendant's Rule 40 removal hearing, he waived an identity hearing. On the same date, the magistrate signed an order directing defendant's removal forthwith to this district.

On April 8, 1985, defendant was transferred from the San Francisco County Jail, where he had been since February 7, 1985, to Sutter County Jail in California. Defendant stayed there until April 17, 1985 because the USMS was waiting to assemble several prisoners for transport to Oregon and Washington rather than traveling with defendant alone.

On April 17, 1985, defendant was transported to the Multnomah County Jail in Portland, Oregon. But on April 18, 1985, the United States District Court for the Northern District of California issued a second writ of habeas corpus ad testificandum ordering defendant's attendance at a retrial of *Seigert*. Defendant therefore remained in Portland, Oregon until a Seattle Deputy Marshal became available to fly with him back down to California on April 23, 1985. Retrial of the *Seigert* case was held on May 7, 1985. From May 6, 1985 to May 13, 1985, defendant remained in the San Francisco County Jail. On May 13, 1985, defendant was transferred to the Sacramento County Jail; on May 16, 1985 to the Multnomah County Jail; and on May 17, 1985 to the Pierce County Jail in this district.

Meanwhile, on April 24, 1985, a grand jury in this district issued a superseding indictment charging defend-

ant with three counts of criminal violations. The first two counts are the same as those charged in the original indictment. Count III alleges a violation of 18 U.S.C. § 3150 for failure to appear for trial on November 19, 1984.

II. LEGAL ARGUMENT

A. Motion to Dismiss Counts I and II

Pursuant to the Speedy Trial Act ("STA"), 18 U.S.C. § 3161(c)(1), a defendant must be brought to trial within 70 days of his or her indictment or initial appearance in the charging district, whichever occurs later. Under § 3161(h), however, certain periods of delay are excludable from the calculation of time elapsed. Based on the facts set forth above, defendant argues that, as to Counts I and II of the original indictment, the government failed to comply with the STA and that those counts must be dismissed under § 3162(a)(2).

The government does not dispute that as of November 19, 1984, defendant's original trial date on Counts I and II, only one day of speedy trial time remained under § 3161(c)(1). But the government first contends that a new 70-day period began under § 3161(c)(1) when defendant was arrested. The government asserts that under other unpredictable, disruptive circumstances where the customary flow of the prosecution is interrupted, the 70-day period starts running anew from the date of the disruptive event because Congress did not intend the government to be penalized by the occurrence of events over which it has no control. Examples include a declaration of mistrial, the reinstatement of an indictment following appeal, or the withdrawal of a defendant's guilty plea. § 3161(d)(2), (e) and (i). The government argues that, pursuant to this reasoning, a new 70-day period should start running from the time of defendant's return to this district after his recapture.

The court finds no authority for this argument nor does the language of the STA support it. The STA specifically provides that delay resulting from the unavailability of the defendant constitutes excludable time, § 3161(h)(3)(A), not that defendant's return to a district after flight and recapture starts the running of an entirely new 70-day period. If Congress had intended the latter result, it would have said so.

Thus, the court must examine the time elapsed between November 19, 1984 and April 24, 1985 to determine how much of that is excludable under § 3161(h) and whether the government violated the STA. Defendant concedes that the period of time between his flight on November 19, 1984 and his arrest on February 5, 1985 falls under § 3161(h)(3)(A), which makes excludable any period of delay attributable to the unavailability of the defendant. Defendant also concedes that the time between March 6, 1985, the date of his initial appearance before a magistrate in California, and April 3, 1985, the date on which the magistrate ordered his removal to this district, is a period of delay attributable to removal proceedings and, therefore, excludable under § 3161(h)(1)(G). The remaining time periods which the court must examine for excludable time are two in number: (1) February 6, 1985 through March 5, 1985; and (2) April 4, 1985 through April 23, 1985.

Looking at the first period, defendant was in state custody from February 6 until February 7, 1985. The USMS then took custody of defendant pursuant to the writ from the Northern District of California. The trial at which defendant's testimony was required ended on February 22, 1985. The court concludes that the time through February 22, 1985 is excludable under the general language of § 3161(h), which covers "[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to—[certain specified proceedings]." *Compare United States v. Rodriguez-Franco,*

749 F.2d 1555 (11th Cir. 1985); *United States v. Lopez-Espindola*, 632 F.2d 107 (9th Cir. 1980).

Defendant then remained in federal custody for eleven more days, from February 23, 1985 to March 5, 1985, until he was finally brought before a magistrate on March 6, 1985 pursuant to the bench warrant issued by this court. The government argues strenuously that until February 28, 1985, defendant was only in temporary federal custody because the USMS was holding him with the understanding that he would be returned to state custody at the end of the *Seigert* trial. Then, on February 28, 1985, the state charges were dropped, clearing the way for the USMS to obtain sole custody. Because of the persisting state hold, the government contends that this whole period is excludable.

Under the circumstances of this case, the court must reject the government's argument. Whatever defendant's status was with regard to the state charges, the fact is that the USMS retained custody of defendant. The relative importance which the government placed upon the state hold is amply demonstrated by the failure of the USMS to produce defendant in San Mateo County Court on February 28, 1985 despite a direct order from Judge Pliska of that court. The court concludes that the period of six days from February 28, 1985 is not excludable.

As for the period from March 1 to March 5, 1985, the government implicitly concedes that this period does not fall within any statutory exclusion. Therefore, five more days passed for purposes of § 3161(c).

Turning to the second period of time, April 4, 1985 through April 23, 1985, the important fact is that the magistrate in California ordered defendant's removal to this district on April 3, 1985. The STA, § 3161(h)(1)(H), provides an exclusion for

> delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, *except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable.*

(Emphasis supplied.) Thus, the period of delay through April 13, 1985 is excludable. However, the four days which then elapsed before the writ commanding defendant's return to California was issued on April 18, 1985 must be presumed an unreasonable delay. The government attempts to rebut this presumption by arguing that the length of the trip was defendant's fault: if he had not escaped and been recaptured in California, then the government would not have had to transport him such a long distance. This argument is not persuasive. Surely Congress knew when it established the presumption that defendants would not always conduct their lives so as to enhance the government's convenience.

Finally, the court concludes that the period from April 18, 1985 to the conclusion of the *Seigert* trial, which occurred after April 24, 1985, is excludable under the general language of § 3161(h) concerning other proceedings.

To summarize the above discussion, the conclusion is inescapable that the government did violate the STA. The court rules that, even allowing the government a full ten days to effectuate the defendant's return to this district, there elapsed at least fourteen days of nonexcludable time in excess of the 70-day requirement set forth in § 3161(c)(1) prior to April 24, 1985, the date on which the government filed the superseding indictment against defendant. Therefore, pursuant to § 3162(2), Counts I and II of the original indictment must be dismissed. The real question is whether this dismissal should be with or without prejudice. On this point, the STA, § 3162(2), provides as follows:

> In determining whether to dismiss the case with or without prejudice, the court shall consider, among

> others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

Regarding the first factor as applied to the instant case, there is no question that the drug violations with which the defendant is charged are serious. However, the second factor, the circumstances of the case leading to the dismissal, tends strongly to support the conclusion that the dismissal must be with prejudice. There is simply no excuse for the government's lackadaisical behavior in this case. Despite the government's insistence on the temporary nature of the federal custody from February 7 until February 28, 1985, the USMS did not return defendant to state authorities after the purported reason for that temporary custody had ended on February 22, 1985. Even more telling is the failure of the USMS to produce defendant on February 28, 1985 pursuant to a specific court order from a San Mateo County judge.

After the state hold was dropped, it took the government six more days to arrange for defendant's initial appearance before a magistrate despite the fact that he had been in federal custody in the district for almost a month. Nor did the order of removal issued of April 3 prompt any particular show of concern on the government's part. Instead of responding with dispatch, the government apparently placed more value on accommodating the convenience of the USMS than on complying with the plain language of the STA. Pursuant to the third factor, the court concludes that the administration of the STA and of justice would be seriously impaired if the court were not to respond sternly to the instant violation. If the government's behavior in this case were to be tacitly condoned by dismissing the indictment without prejudice,

then the STA would become a hollow guarantee. Counts I and II of the original indictment must be dismissed with prejudice.[1]

B. Motion to Dismiss Count III

Defendant also moves to dismiss Count III of the superseding indictment, the failure to appear charge, pursuant to § 3162(a)(1) on the grounds that under § 3161(b), the indictment charging him with the commission of that offense should have filed within 30 days from the date on which he was arrested.

The government responds that in order for the 30-day period to start running, the defendant must have been "arrested or served with a summons in connection with such charge." § 3161(b). The government argues that the arrest warrant pursuant to which defendant was arrested was not related to, and defendant was not arrested on, a formal charge brought against him for his failure to appear, thus making § 3161 inapplicable. In support of this argument, the government cites *United States v. Stead*, 745 F.2d 1170, 1173 (8th Cir. 1984); *United States v. Wilson*, 690 F.2d 1267, 1276 (9th Cir. 1982); and *United States v. Lyon*, 567 F.2d 777, 781 n.3 (8th Cir. 1977).

The court finds the above-cited cases distinguishable and rejects the government's argument. Both *Stead* and *Wilson* involved the recapture of escapees from prison who were later indicted for the escapes. Under those circumstances, the court held that the arrests were a continuation of defendants' incarcerations pursuant to their original convictions and not arrests in connection with

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[1] The court realizes the incongruity of dismissing with prejudice portions of an indictment which is no longer in effect because it has been superseded. However, this approach appeared to be the most logical way to proceed under the rather curious circumstances of this case. The real effect of the court's ruling is, of course, that Counts I and II of the superseding indictment, which simply echo the original indictment, must be dismissed with prejudice.

their escapes. In *Lyon*, the facts appear more similar to defendant's situation, but the discussion is so minimal that this court cannot effectively evaluate the underlying reason for the ruling.

In the instant case, the court finds it unreasonable and illogical to say that defendant was not arrested "in connection with" the charge of failure to appear for which he was later indicted. The bench warrant specifically cited failure to appear as the basis for the court order. At the defendant's initial appearance on March 6, 1985 before a magistrate after his arrest, a deputy marshal submitted an affidavit stating that on November 19, 1984, this court had filed an order charging defendant with violation of 18 U.S.C. § 3150 in that he failed to appear for trial. There is no question that defendant's arrest in California was, at least in part, pursuant to that court order.

If defendant was arrested in connection with the charge of failing to appear, then the government had 30 days in which to indict him under § 3161(b). However, the excludable periods of delay listed in § 3161(h) are also applicable in computing the time within which an indictment must be filed. Thus, the following periods are excludable: February 5 through February 22, 1985 under the general language of § 3161(h); March 6 through April 3, 1985 under § 3161(h)(1)(G); April 4 through April 13, 1985 under § 3161(h)(1) (H); April 18 through April 23, 1985 under the general language of § 3161(h). Defendant was indicted for failure to appear on April 24, 1985.

Based on the above analysis of the relevant time period, the court concludes that the government did not violate § 3161(b) because less than 30 days elapsed between defendant's arrest and his indictment if one takes into account the excludable periods of delay.

The court notes that defendant did request an evidentiary hearing on his motion to dismiss. However, that request was made before the government came forward with

a detailed explanation of the defendant's whereabouts during the time in question. The court believes that it now has all the relevant information necessary to rule on defendant's motion and cannot discern any reason for a hearing. But if after reading the instant order, defendant still perceives the necessity for an evidentiary hearing, he shall so inform the court within ten days of the issuance of this order.

In conclusion, the court GRANTS defendant's motion to dismiss Counts I and II of the original indictment with prejudice and DENIES defendant's motion to dismiss Count III of the superseding indictment.

IT IS SO ORDERED.

The Clerk of the Court is directed to forward copies of this Order to counsel of record.

DATED at Seattle, Washington this 1st day of August, 1985.

/s/ BARBARA J. ROTHSTEIN

Barbara J. Rothstein
United States District Judge

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ORIGINAL

No. 87 - 573

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

UNITED STATES OF AMERICA

Petitioner

v.

LARRY LEE TAYLOR

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

Cases: page

QUESTIONS PRESENTED

Whether this court should disturb a trial court decision to dismiss a prosecution with prejudice after;

1.) Finding a clear violation of the Speedy Trial Act of 1974, 18 U.S.C. 3161 et seq. and;

2.) carefully considering the factors mandated in the Sanction section of the Act 31 USC 3162, and

3.) the trial court's decision was upheld on appeal.

IN THE SUPREME COURT OF THE UNITED STATES

October term of 1987

UNITED STATES OF AMERICA

Petitioner

v.

LARRY LEE TAYLOR

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case on behalf of Petitioner. Except to add that Respondent plead guilty to the bail jump charge, and was sentenced to the maximum of five years.

REASONS FOR DENYING THE WRIT

This Court should deny the petition because the trial court considered all the factors mandated by the Speedy Trial Act and decided, based on her evaluation of the competing interests, that dismissal with prejudice was necessary to enforce the protections of the Act. The ruling was one particularly suited for decision by a trial court and is one that should not be disturbed absent a clear showing of abuse of discretion, unless this Court wants to micro-manage all the trial courts of this nation. There is no conflict with any other circuit as to the test to be applied or the factors to be considered. The government is unhappy with the result in this unique factual situation and seeks to use it to tie the hands of trial courts to deal with the competing interests that will always be present in these types of cases.

ARGUMENT

I. THERE IS NO PRESUMPTION FAVORING THE USE OF EITHER A DISMISSAL WITH PREJUDICE OR WITHOUT PREJUDICE AS THE REMEDY FOR A VIOLATION OF THE SPEEDY TRIAL ACT.

It seems clear, given the extensive discussions, both in the Legislative History and in the cases, concerning the appropriate sanction to be employed by the trial court after a determination of a violation of the Speedy Trial Act, and the clear language of the Act itself, that there is no presumption, one way or another, as to which sanction to apply.

It is disingenuous to argue that "the premise of the amendment to the sanction provision was that dismissals without prejudice would be an adequate sanction for most statutory speedy trial violations. (Petition for a Writ of Certiorari. pg. 11) and that prejudice to the defendant is an absolute prerequisite to a dismissal with prejudice. (See United States v. Russo 741 F2d 1264, 1267 (1984 11th Cir.); United States v. Caparella 716 F 2d 976, 979 - 980 (1983 2nd Cir.)

The plain fact of the matter is that after all was said and done, the discretion was placed, in clear language, in the hands of the trial court, and absent a clear showing of abuse, that discretion should not be disturbed. (United States v. Frey 735 F2n 350, 353 - 354 (1984 9th Cir); United States v. Salgado-Hernandez 790 F2nd 1265 1986 5th Cir.)

II. THE TRIAL COURT USED THE PROPER TEST, THE PROPER FACTORS, AND HER DETERMINATION OF THE RELATIVE IMPORTANCE OF THOSE FACTORS IN MAKING HER DECISION SHOULD NOT BE DISTURBED.

It cannot be argued that the trial court used an improper method to make her determination. Her opinion sets forth proper, statutorily mandated factors to be considered, and why, in her judgment, a strong message was needed to secure the active

participation of the government in protecting the Speedy Trial rights of defendants in her district. It appears she felt that only by sternly dealing with the United States Attorney's ongoing policy of not requiring the United States Marshall's Service to transport its prisoner's with the Speedy Trial Act in mind could the true values of the Act be implemented. Her decision comports with the provisions of the act and serves to enhance the proper administration of the Act within her district and it was this very proper motive that led to the dismissal with prejudice.

CONCLUSION

The factual situation here is peculiar. Respondent was indeed prejudiced by the delay both as to the time he spent in custody and the number of different facilities within which he was confined on his tortuous journey from San Francisco to Seattle. The trial court found the government's attitude lackadaisical. Their failure to secure Respondent's presence was, we believe, grossly negligent.

Whether any other person would have made the same decision is not the question. The question is, Does the Supreme Court want to be saddled with these discretion - type decisions just because the government does not like the result?

Where the Trial Court, vested with the knowledge of the circumstances both of this case and the United States Attorney's attitude toward the Act and its values, decides in her discretion, that a particular sanction is appropriate and in reaching that decision, clearly demonstrates that the proper method was used to reach that result, then this decision, after being affirmed by the appellate court, should not be disturbed. The Petition should be denied.

Respectfully submitted,

ANDRE LABOUDE
Attorney at Law

IAN G. LOVESETH
Attorney at Law

DATED: December 22, 1987

Of Counsel:

CHARLES FRIED
Solicitor General

PROOF OF SERVICE

I am a citizen of the United States and am employed in the City and County of San Francisco; my business address is 819 Eddy Street., San Francisco, California 94109. I am over the age of 18 years and not a party to the within above-entitled action.

On December 22,1987, I served the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND AFFIDAVIT IN SUPPORT THEREOF and BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on the parties in said action by mailing a true copy thereof to:

Charles Fried
Solicitor General
Department of Justice
Washington, D.C. 20530

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22nd day of December, 1987 at San Francisco, California.

Judith A. Moore

Judith A. Moore

No. 87-573

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

LARRY LEE TAYLOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED OCTOBER 11, 1987
CERTIORARI GRANTED JANUARY 19, 1988

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-573

UNITED STATES OF AMERICA, PETITIONER

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LARRY LEE TAYLOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

No. 84-204

UNITED STATES OF AMERICA

v.

LARRY LEE TAYLOR, DEFENDANT

RELEVANT DOCKET ENTRIES

DATE	DOC. NO.	PROCEEDINGS
1984		
July 25	1	INDICTMENT
July 25	2	ORDER (JLW) DEFT TAYLOR. Fixing bail in the amt of $25,000.00 c/cs
July 25	3	ORDER (JLW) DEFT ROMANI. Fixing bail in the amt of $25,000.00
July 25	4	ORDER (JLW) DEFT ANGELI. Fixing bail in the amt of $25,000.00 c/cs or acceptable property.
July 26	5	PRAECIPE DEFT ANGELI, for a summons. ISSUED.
July 26	6	PRAECIPE DEFT ROMANI, For a summons. ISSUED.
July 26	7	PRAECIPE DEFT TAYLOR, For a summons. ISSUED.

DATE	DOC. NO.	PROCEEDINGS
Aug. 1	8	RETURN On summons executed on 8-1-84.
Aug. 6	9	REQUEST Deft's. for notice.
Aug. 2	10	ENT (JLW) ARRAIGNMENT. DEFT. ROMANI AUSA S. Gustafson, Deft cnsl Judd Iverson Tape # W-710, deft present vol, Court asks deft. true name and age (31), Deft. advises the court he has received a copy of information, deft. waives formal reading of info deft. advised of rights and charges. Deft. entered NOT GUILTY plea to both counts, deft. Trial scheduled b4 BJR on 9-10-84 at 9:00 a.m. PTM to be filed by 8-23-84. Bond 10% of $25,000 & q parents appear by 8-10-84 re property risks advised, 3 Value of property, under supervision of pre-trial services while set on bond. Matter cont'd to later this same date at 11:30 a.m. pre-trial services report for purposes of setting conditions of release. 8-9-84 Local cnsl & pro hac via application due. deft to meet w/PTS.
Aug. 2	11	APPEARANCE BOND. DEFT. ROMANI
Aug. 9	12	ENT (PKS) ARRAIGNMENT. Def ANGELI AUSA S. Gustafson,

DATE	DOC. NO.	PROCEEDINGS
		deft cnsl Dan Dubitzky, tape # S-604, deft present vol, Court asks deft. true name and age, deft. advises the court he has received a copy of indictment. Deft. waiver formal reading of Indictment. deft. entered not guilty plea to Ct's I & II, Trial scheduled b4 Judge BJR on 9-10-84 at 9:30 a.m. PTM to be filed by 8-23-84. Matter cont'd re: Bond at the end of calendar, Court set PR bond deft. waives right to be present if AUSA Andy Hamilton want to arg PR Bond.
Aug. 9	13	APPEARANCE BOND.
Aug. 9	14	ENT (PKS) ARRAIGNMENT: AUSA Gustafson; Def Cnsl Loveseth; Def TAYLOR not present; Matter continued until 1:30.
Aug. 9	15	ENT (PKS) ARRAIGNMENT: AUSA Dohrmann; Def Cnsl Loveseth; Def pres; Def advised of charges; Def pleads NOT GUILTY to Counts I & II; Trial set BJR 9/10/84 9:00; Motions due 8/23/84; Def placed on PR Bond PRS super. in San Francisco.
Aug. 9	16	APPEARANCE BOND Def Taylor
Aug. 8	17	RETURN of Summons deft ROMANI executed 8-2-84

DATE	DOC. NO.	PROCEEDINGS
Aug. 8	18	RETURN of Summons deft TAYLOR executed 8-2-84
Aug. 13	19	REQUEST DEFT. ROMANI. For notice.
Aug. 15	20	MOTION of Def ANGELI for Continuance of Trial Date (sh)
Aug. 15	**	Lodged Order
Aug. 15	21	MOTION to shorten time on Motion to Continue Trial (sh)
Aug. 15	**	LODGED Order shortening time
Aug. 16	**	LODGED Waiver of speedy trial and order approving waiver and excluding time.
Aug. 23	22	MOTION of Def ROMANI for Discovery & inspection (sh)
Aug. 23	23	NOTICE of Def ROMANI of Motion & Motion for Bill of Particulars (sh)
Aug. 23	24	MEMORANDUM in support of Motions (sh)
Aug. 23	25	JOINDER of Defs ANGELI & TAYLOR in Motions (sh)
Aug. 15	26	APPEARANCE BOND for Def ROMANI
Aug. 23	27	WAIVER of Speedy Trial for Def ROMANI (sh)
Aug. 23	28	WAIVER of Speedy Trial for Def TAYLOR (sh)
Aug. 23	**	LODGED Stipulated Order Continuing Trial Date; Approving Waiver & Excluding Time (sh)

DATE	DOC. NO.	PROCEEDINGS
Aug. 24	29	ORDER (BJR) Trial continued to OCTOBER 17, 1984 as to all defts PTM: 20 SEPTEMBER 1984 Speedy Trial excludable pursuant to 18:3161(h)(8)(a) & as to deft ANGELI 18:3161(h)(8)(b)(iv) EOD: 8/24/84 cc: AUSA def cnsls USPO J&O BJR (pv)
Aug. 27	30	NOTICE DEFT. ROMANI, Of mots for discovery and inspection and bill of particulars and for oral argument.
Aug. 27	31	DEFT. TAYLOR WAIVER Of Constitutional Rights to a speedy trial
Aug. 29	32	NOTICE Of appearance.
Sept. 5	33	ENT (BJR) Cnsl for the govt having represented to the Court that DEFT'S ROMANI'S mot for discovery and inspection and for bill of particulars were not received by him until 8-27-84, the Court orders deft. ROMANI'S mot renoted for 9-14-84. The govt shall have until 9-10-84 to file responses to the mot.
Sept. 6	34	REQUEST DEFT. ANGELI'S for notice.
Sept. 10	35	RESPONSE Govt's to DEFT. ROMANI'S mot for discovery and inspection.

DATE	DOC. NO.	PROCEEDINGS
Sept. 10	36	RESPONSE Govt's to deft's mot for a bill of particulars.
Sept. 13	37	APPLICATION To appear as cnsl. DEFT. ROMANI.
Sept. 13	38	DECLARATION Of Jeffrey Steinborn.
Sept. 13	**	LODGED Order for Judd C. Iversen to appear as cnsl for DEFT. ROMANI.
Sept. 18	39	PRAECIPE Issue six subpoenas in blank and in dup. ISSUED.
Sept. 19	40	ORDER (BJR) GRANTING Attorney Judd C. Iversen to appear as cnsl for DEFT ROMANI. cc: AUSA, DEFT CNSL,
Sept. 19	41	ORDER (BJR) DENYING Mots for discovery and for bill of particulars. cc: AUSA, DEFT CNSL, (EOD 9-20-84).
Sept. 21	42	MOTION For bill of particulars Noted for 10-5-84 DEFT. ANGELI.
Sept. 21	43	MOTION DEFT. ANGELI'S for severance. Noted for 10-5-84.
Sept. 21	44	MOTION DEFT. ANGELI for production of impeachment information. Noted for 10-5-84.
Sept. 21	45	MEMORANDUM Of points and authorities in support of mot for

DATE	DOC. NO.	PROCEEDINGS
		disclosure of impeachment information. DEFT ANGELI.
Sept. 21	46	DECLARATION (DEFT ANGELI) Of Dan R. Dubitzky in support of mot to produce impeachment information.
Sept. 21	47	MOTION (DEFT ANGELI) to suppress contents of one inside jacket pocket and the fruits thereof
Sept. 21	48	JOINDER In motions of Deft. Angeli.
Sept. 27	**	LODGED Stipulation and order
Oct. 2	49	STIPULATION DEFT. ANGELI. cc: AUSA, DEFT CNSL. (EOD 10- and ORDER (BJR) 2-84).
Oct. 2	50	COVER LETTER Stating deft cnsl has enclosed copies of the waiver of speedy trial as to DEFT ROMANI.
Oct. 2	51	WAIVER OF speedy trial. DEFT. ROMANI.
Oct. 5	52	WAIVER DEFT. ANGELI, Of speedy trial
Oct. 5	53	WAIVER DEFT. ROMANI Of speedy trial.
Oct. 5	54	WAIVER DEFT. TAYLOR Of speedy trial.
Oct. 5	**	LODGED Order continuing trial. DATE.

DATE	DOC. NO.	PROCEEDINGS
Oct. 5	54	ORDER (BJR) Continuing Trial Date til 11/19/84. Cc & Ent. 10/5/84
Oct. 9	55	RECONVEYANCE of DEED OF TRUST for Def ANGELI
Oct. 12	**	LODGED Govts consolidated response to defs' mots
Oct. 15	**	LODGED ORDER for the govt's mot to file consolidated response to deft's mot in excess of 12 pages.
Oct. 15	**	LODGED Order Govts mot to shorten time for hearing
Oct. 15	56	MOTION Govts to shorten time for hearing Noted 10-17-84.
Oct. 15	57	MOTION Govts to file consolidated response to defts mot in excess of twelve pages. Noted for 10-26-84.
Oct. 17	58	ORDER (WTM) The date of 10-17-84 is set for hearing the govts mot to file consolidated response to defts' mot in excess of 12 pages. cc: AUSA, DEFT CNSL, (EOD 10-17-84.
Oct. 17	59	ORDER (WTM) Govts mot to file consolidated response to defts mot in excess of 12 pages cc: AUSA, DEFT CNSL. (EOD 10-17-84).
Oct. 17	60	RESPONSE Govts' consolidated response to defts mots.

DATE	DOC. NO.	PROCEEDINGS
Oct. 31	61	ORDER (BJR) DENYING DEFT. ANGELI'S mot for severance and GRANTING leave to refile. cc: AUSA, DEFT CNSL USPO, (EOD 10-31-84).
Oct. 31	62	ORDER (BJR) DENYING DET. ANGELI'S mot for bill of particulars and for production of impeachment information. cc: AUSA, DEFT CNSL, USPO. (EOD 10-31-84).
Oct. 30	63	ENT (BJR) The Court orders a hearing scheduled on DEFT ANGELI'S mot to suppress for Fri 11-9-84 at 10:30 a.m.
Oct. 31	64	RETURN On subpoena issued to Rose Van Anken unexecuted
Nov. 9	65	ENT (BJR) HEARING ON DEFT'S ROMANI and ANGELI TO SUPPRESS AUSA Tom Wales, Deft Judd Iverson and Dan Dubitzky, CR Joe ROTH, DEFT ANGELI is present on bond, and represented by cnsl. The Court notes the absence of DEFT ROMANI, whose cnsl indicates that Mr. Romani was aware of both the time and place of the hearing and that Mr. Romani's absence is due to flight connections from San Francisco. The Court GRANTS

DATE	DOC. NO.	PROCEEDINGS
		Mr. Iverson's mot to exclude witnesses from the court room. The govt's witness, is sworn and testifies. Mr. Romani arrives 10 minutes into Ms. Schumate's testimony and is present for the remainder of these proceedings. Deft's exhibit #1 is marked and admitted. Deft's witness, is sworn and testifies. After hearing the closing arg of cnsl, the court DENIES the mot to suppress. The Court takes Mr. Wales' mot to provide for search of DEFT'S TAYLOR and ROMANI prior to each court proceeding under advisement. Mr. Wales will provide an affidavit pertaining to this mot to the court *in camera* or a mot to detain the deft's.
Nov. 9	66	RETURN On subpoena issued to John Policano, Custodian of records. executed on 11-6-84.
Nov. 14	67	PRAECIPE Issue in duplicate and in blank 50 Subpoenas.
Nov. 13	68	TRIAL BRIEF Govt's.
Nov. 14	69	REQUESTED VOIR DIRE DEFT. ANGELI'S questions.
Nov. 14	70	JURY INSTRUCTIONS DEFT. ANGELI'S w/citations.

DATE	DOC. NO.	PROCEEDINGS
Nov. 15	71	REQUESTED INSTRUCTIONS Pltf's.
Nov. 16	72	MOTION DEFT. ANGELI. In limine.
Nov. 16	73	SUBPOENA Issued to Ursula Elbert executed on 11-8-84 Issued to Richard Rosinia executed on 10-31-84 Issued to Lauren Haugen executed on 11-13-84 Issued to Yolanda Parker executed on 11-10-84 Issued to Robert Dale Goldthwaite executed on 11-10-84, Issued to Marvel Laurelle Taylor executed on 11-10-84, Issued to Margaret Lee executed on 1-9-84.
Nov. 19	74	ENT (BJR) AUSA T. Wales, Deft Cnsl Ian Loveseth DEFT TAYLOR fails to appear Trial; the Court directs the Clerk to issue a warrant for DEFT TAYLOR's arrest. cc: all cnsl of record, usmo, (EOD 11-19-84) WARRANT ISSUED. cc: USPO
Nov. 19	75	INFORMATION DEFT. ANGELI.
Nov. 19	76	PLEA AGREEMENT. DEFT. ANGELI
Nov. 19	77	MOTION DEFT. ROMANI, For dismissal or, in the alternative, for exclusion of testimony and sanctions against the govt for violation of deft's attorney/client privilege.

DATE	DOC. NO.	PROCEEDINGS
Nov. 19	78	MOTION In limine. DEFT. ROMANI.
Nov. 19	79	MOTIONS For severance. DEFT TAYLOR.
Nov. 19	80	VOIR DIRE DEFT. TAYLOR'S proposed questions.
Nov. 19	81	ENT (BJR) FIRST DAY OF TRIAL. AUSA, T. Wales, Deft Cnsl's for deft ROMANI J. Iverson present and deft cnsl for deft TAYLOR I. Loveseth present. CR Joe Roth, Deft. TAYLOR fails to appear. the Court directs the clerk to issue a warrant for Mr. Taylors arrest: the warrant is issued. Deft. ROMANI present, on bond, and represented by cnsl. The Court hears argument on the pending mot in this matter and the following briefing schedule is ordered as to DEFT ROMANI'S to dismiss: the govt will file its response to deft ROMANI'S mot by 11-28-84, DEFT ROMANI will file his reply no later than 12-3-84, this mot is noted on the court's calendar for 12-7-84 at 10:30 a.m. Upon deft's representation that he will file a waiver of speedy trial, trial in this matter is cont'd to Mon. 1-14-85 at 9:30 a.m. Cnsl will prepare a proposed order continuing trial for the Court's signature. The Court will anticipate receiving both of these documents at the earliest possible date. Deft ROMANI remains at liberty on bond pending trial.

DATE	DOC. NO.	PROCEEDINGS
Nov. 19	82	ENT (BJR) REVISION OF PLEA. DEFT ANGELI. AUSA T. Wales, Deft cnsl D. Dubitzky, CR Joe Roth, Deft is present, on bond, and represented by cnsl. The Court informs the deft of her rights and of the charge against her. The deft. is sworn and questioned by the court. The court revises the superseding information file by the govt and the plea agreement submitted by the parties. Mr. Wales presents the govt's offer of proof. After finding the deft competent to enter a plea, that the deft did commit the crime charged in the information, and that the deft is making her plea vol, the court accepts and enters deft's plea of GUILTY. Sent in this matter is scheduled for Fri. 1-4-84 at 9:30 a.m.
Nov. 21	83	RETURN On subpoena issued to Joseph Cannon returned unexecuted.

DATE	DOC. NO.	PROCEEDINGS
Nov. 19	84	JOINER DEFT. TAYLOR, hereby joins in all mots. filed on behalf of DEFT. ROMANI.
Nov. 23	85	RETURN On subpoena issued to Michael H. Metzger, Esq. executed on 11-14-84.
Nov. 29	**	LODGED Stipulated Order continuing trial date: approving waiver and excluding time.
Nov. 29	86	WAIVER ROMANI, Of constitutional rights to a speedy trial.
Nov. 29	87	RETURN On subpoena issued to Randy DeCuyper, returned unexecuted. on 11-23-84.
Nov. 29	88	RETURN On subpoena issued to James Chapman, returned unexecuted.
Nov. 29	89	LETTER Re: govt's response to deft's mot.
Nov. 30	90	response govt's consolidated to deft's mot for dismissal and mot in limine.
Dec. 3	91	STIPULATED ORDER (DSV) Continuing trial date; approving waiver and excluding time. TRIAL TO 1-14-84. IT IS FURTHER ORDERED that the govt's response to deft's mot be filed by 11-28-84. The Court hereby approves the Waiver of Speedy Trial

DATE	DOC. NO.	PROCEEDINGS
		filed by DEFT. ROMANI and orders excluded, time period from this day forward until 1-14-85 DEFT'S ROMANI and TAYLOR. cc: AUSA, DEFT CNSL (EOD 12-4-84).
Dec. 7	92	LETTER Re: documents filed.
Dec. 7	93	CERTIFICATE Of service.
Dec. 7	94	MOTION DEFT. ROMANI for evidentiary hearing.
Dec. 7	95	DECLARATION Of Judd C. Iversen in support of DEFT ROMANI'S reply to govt's response to mot for dismissal.
Dec. 7	96	MOTION To compel disclosure of United States Attorney's jury selection data; Memo of points and authorities in support thereof.
Dec. 7	97	REPLY DEFT's to govt's response to mot for dismissal.
Dec. 5	98	ENT (BJR) IN CHAMBERS. The court has reviewed *in camera* the PSR of Steven Cannon. The govt represents that it will disclose to defts the written stmnt of Mr. Cannon contained in the report. The court is satisfied that the remaining portions of the report contain no Brady or Jencks material and therefore need not be provided to defts.

DATE	DOC. NO.	PROCEEDINGS
Dec. 14	99	ENT (BJR) DEFT ROMANI. PRE-TRIAL CONFERENCE. AUSA T. Wales, Deft Cnsl Judd Iverson, CR Joe Roth, Deft ROMANI's mot to dismiss the indictment is DENIED. The court finds that a hearing regarding attorney-client privilege is unnecessary. The court declines to review Mr. Metzger's affidavit; the affidavit will be returned to Mr. Metzger. The court DENIES DEFT. ROMANI's mot to compel the govt to provide its Jury book to the deft.
Dec. 11	100	RETURN On subpoena issued to James Chapman, executed on 12-4-84.
Dec. 20	101	ENT (BJR) at cnsl request, sentencing cont. to 18 JANUARY 1985 at 9:30 am for deft ANGELI (pv)
Dec. 26	102	RESPONSE Gov't to deft ROMANI's mtn re: jury selection data (pv)
1985		
Jan. 3	103	RETURN On subpoena issued to DEFT ANGELI. EXECUTED On 12-19-84.
Jan. 7	104	TRIAL BRIEF Govt's supplemental.

DATE	DOC. NO.	PROCEEDINGS
Jan. 8	105	RETURN On subpoena issued to Ursula Elbert executed on 12-26-84.
Jan. 14	106	ENT (BJR) The affidavit of Michael H. Metzger will neither be reviewed nor considered by this court. the Clerk of Court will place Mr. Metzger's affidavit and the accompanying letter under seal.
Jan. 14	107	MOTION In Limine to Exclude hearsay. DEFT ROMANI
Jan. 14	108	LETTER From Michael H. Metzger to HON. BJR. THIS DOCUMENT IS UNDER SEAL.
Jan. 14	109	DECLARATION Of Michael Metzger. THIS DOCUMENT IS UNDER SEAL.
Jan. 15	110	ENT (BJR) PRETRIAL CONFERENCE. DEFT. ROMANI AUSA T. Wales, Deft Cnsl J. Iverson, CR Joe Roth, The court hears the motions in limine of the govt. and of the deft. Deft's mot re: the testimony of Ann Angeli is taken under advisement. FIRST DAY OF JURY TRIAL AUSA T. Wales, Deft Judd Iverson, CR Joe Roth, The Deft is presented on bond, and represented by cnsl. The prospective jurors are sworn and voir dire pro-

DATE	DOC. NO.	PROCEEDINGS
		ceeds. Jurors are excused for cause. The following jurors are sworn and empanelled: Cnsl present their opening stmnts Pltfs witnesses are sworn and testify. The stipulation of cnsl is read to the jury. Exhibits are marked and admitted. Cnsl for the govt will substitute the contents of exhibit #9 (cocaine) with some substance of similar appearance but which is not a controlled substance. Further trial is cont'd to TUES 1-15-85 at 9:30 a.m.
Jan. 15	111	DECISION DEFT ROMANI not to testify.
Jan. 15	112	CHALLENGES For cause. none. Govt's
Jan. 15	113	CHALLENGES For cause. none Govt's.
Jan. 15	114	PEREMPTORY Challenges of jurors. Deft's. ROMANI.
Jan. 15	115	PEREMPTORY Challenges of jurors. Govt's.
Jan. 14	116	RETURN On subpoena issued to Marvel Laurelle Taylor executed on 1-3-85, issued to Robert Dale Goldthwaite executed on 1-3-85.
Jan. 15	117	ENT (BJR) SECOND DAY OF JURY TRIAL. DEFT. ROMANI AUSA T. Wales, Deft Cnsl J. Iverson, The deft is present, on bond, and represented by cnsl. The testimony of pltfs witness continues and concludes. Pltfs witnesses are sworn and testify. Exhibits are marked and admitted. Further trial in this matter is continued to Wed 1-16-85 at 9:30 a.m. the deft remains at liberty on bond.
Jan. 15	118	INSTRUCTIONS Court's to the jury.
Jan. 15	119	JURY INSTRUCTIONS Deft's proposed.
Jan. 15	120	EXHIBIT LIST Govt's
Jan. 15	121	WITNESS LIST Govt's.
Jan. 15	122	EXHIBIT LIST Deft's.
Jan. 15	123	JURY SEATING CHART.
Jan. 16	124	ENT (BJR) THIRD DAY OF JURY TRIAL. DEFT ROMANI AUSA T. Wales, Deft cnsl J. Iverson, CR J. Roth, The deft is present, on bond, and represented by cnsl. The testimony of pltf's witness continues and concludes. The govt rests its case in chief. Deft's witnesses are sworn and testify. The deft rests. The govt re-calls Steven Cannon, Joseph Cannon and Kurt Jepson on rebuttal. Deft's mot for a judgment of acquittal is denied. After hearing ex-

DATE	DOC. NO.	PROCEEDINGS
		ceptions to jury instructions, the court instructs the jury and cnsl present their closing args. The jury retires to deliberate until 9:00 a.m on Thurs. 1-17-85.
Jan. 17	125	ENT (BJR) FOURTH DAY OF JURY TRIAL. DEFT ROMANI. AUSA T. Wales. Deft Cnsl J. Iverson, CR J. Roth The deft is present, on bond, and represented by cnsl. The jury returns from deliberations with a verdict of GUILTY to Cts I & II of the Indictment. The court thanks and excuses the jurors. The court rules that Mr. Romani will remain at liberty on bond pending sentencing in this matter is scheduled for Fri. 3-8-85 at 9:30 a.m. The court GRANTS the deft's mot for an extended time in which to file his mot for a new trial; the mot will be filed no later than 2-8-85.
Jan. 18	126	ENT (BJR) SENTENCING, DEFT. ANGELI AUSA T. Wales, Deft cnsl D. Dubitzky, CR J. Roth. The deft is present, on bond, and represented by cnsl. After hearing the stmnts of cnsl. and on the deft. the court defers proceedings in this matter and places the deft on

DATE	DOC. NO.	PROCEEDINGS
		1 yr probation. The Court further orders that any violation of the terms of probation will result in the entry of a judgment of GUILTY in this matter. The Court GRANTS the govt's mot that the original indictment filed in this matter be dismissed as to DEFT. ANGELI.
Jan. 17	127	ORDER (BJR) The Clerk of U.S. District Court pay for the meals of said jurors and said bailiff (s) at the expense of the U.S. Courts. cc: FINANCIAL CLERK (EOD 1-21-85).
Jan. 17	128	VERDICT. DEFT ROMANI. GUILTY of the crime charged in Ct I of the Indictment. and GUILTY in Ct II of the Indictment.
Jan. 23	**	LODGED Judgment and order of probation. DEFT ANGELI
Apr. 11	149	RULE 40 PAPERS from Northern Dist of California deft TAYLOR a) Commitment to Another Dist. cert. cc b) Minute Entry re: commitment to W.D. Wash c) Order & Return directing exam of deft by physician d) Minute Entry re: court directing exam

DATE	DOC. NO.	PROCEEDINGS
		e) Affidavit of U.S. Marshal f) Docket sheet cert cc ***end deft TAYLOR Rule 40 papers***
Apr. 24	151	SUPERSEDING INDICTMENT. DEFT TAYLOR.
Apr. 24	152	ORDER (JLW) Continuing detention. DEFT TAYLOR.
Apr. 25	153	LETTER From AUSA T. Wales. advising deft cnsl Loveseth that DEFT TAYLOR is to appear for arraignment and plea b4 MAG PKS on 5-2-85 at 9:00 a.m.
Apr. 26	154	ENT (BJR) TELEPHONE CONFERENCE – Def TAYLOR Ct. III of Indictment is severed from Cts. I & II; Trial on Cts. I & II set 5/20/85 9:30; Pretrial Motions due 5/3/85, responses due 5/10/85; Motion of Def re: Speedy Trial due 5/10/85. (sh)
Apr. 30	155	2nd SUPPLEMENTAL TRIAL BRIEF – of Plf (sh)
May 7	156	MOTION deft TAYLOR hearing outside jury noted: 5/17/85 (pv)
May 7	157	MEMORANDUM deft TAYLOR support mtn hrg out. jury (pv)
May 7	158	MOTION deft TAYLOR determine admis. statements noted: 5/17/85
May 7	159	MEMORANDUM deft TAYLOR support mtn determine admis statements (pv)

DATE	DOC. NO.	PROCEEDINGS
May 7	160	MOTION deft TAYLOR exclude testimony re: witness statements noted: 5/17/85 (pv)
May 7	161	RESERVATION deft TAYLOR right to challenge admis & request discovery (pv)
May 7	162	PROOF OF SERVE documents 156–161 (pv)
May 9	163	ENT (BJR) Trial is cont'd to Mon 6-17-85 at 9:30 a.m.
May 13	164	RESPONSE of Plf to Def's Motions re: Admissibility of Statements
May 14	166	PRAECIPE for Subpoenas. Issd.
May 15	167	ENT (BJR) DEFT TAYLOR, The court will deem defts mot re speedy trial, due on 5-10-85 and received by the Clerk of Court on 5-15-85 to be timely filed.
May 15	168	MOTION DEFT TAYLOR to dismiss indictment for violation of speedy trial act. MEMORANDUM of points and authorities in support thereof.
May 15	169	DECLARATION Of Ian Loveseth in support of mot to dismiss Indictment for violation of Speedy trial act.
May 15	170	REQUEST For hearing on speedy trial mot. DEFT TAYLOR.

DATE	DOC. NO.	PROCEEDINGS
May 20	171	DECLARATION Supplemental and attachments.
May 20	172	RETURN On subpoena issued to Robert Dale Goldthwaite executed on 5-8-85, issued to DUSM Custodian of records. executed on 5-13-85. issued to DUSM Custodian or records executed on 5-13-85. issued to Marvel Laurelle Taylor executed on 5-8-85.
May 28	* * *	LODGED DEFT TAYLOR Stipulation and order.
May 24	173	RETURN On Subpoena issued to James Chapman executed on 5-15-85. issued to Ursula Elbert executed on 5-14-85.
May 24	174	RETURN On subpoena issued to James Chapman executed on 5-15-85
June 4	175	STIPULATION AND ORDER (BJR) DEFT TAYLOR cc: AUSA, DEFT cncl. (EOD 6-4-85)
June 4	176	ORDER (BJR) DEFT TAYLOR DENTING deft's mots concerning admissibility of stmnts under FRE and acts under FED. R. EVID. 404 (b). Deft's mot to exclude testimony concerning stmnts made by unavailable witnessess DENIED. Deft's mot for hearing outside presence of the jury to determine

DATE	DOC. NO.	PROCEEDINGS
		admissibility of 801 (d) (2) (E) stmnts. DENIED. Deft's mot for hearing outside presence of the jury DENIED. cc: AUSA, DEFT CNSL. (EOD 6-5-85).
June 5	177	RESPONSE Govt's to deft's mot to dismiss indict for violation of speedy trial act.
June 5	180	LETTER From AUSA advising deft cnsl Loveseth for DEFT TAYLOR that deft is to appear for arraignment and plea on 6-13-85 b4 Mag PKS at 9:00 a.m.
June 7	181	ENT (BJR) DEFT ROMANI SENTENCE AUSA T. Wales, Deft Cnsl Judd Iverson, CR J. Roth, deft present, on bond and represented by cnsl. After hearing the stmnts of cnsl the court imposes the following sent.
		SENTENCE 3 yrs in the custody of of Atty Gen
		COUNT I 5 yrs special parole term.
		COUNT II as above, to run concurrently w/Ct I.
		The deft's mot to remain at liberty on bond pending appeal is DENIED. the deft shall self-report to his place of incarceration at the direction of USPO. The court declines to specify a particular institution

DATE	DOC. NO.	PROCEEDINGS
		but will recommend the deft serve his sent in an area close to his family. Mr. Iverson's mot to be allowed to withdraw as cnsl is DENIED. The deft remains at liberty pending reporting.
June 11	182	ORDER (BJR) DEFT TAYLOR Re further briefing on speedy trial mot. The govt shall file its supplementary brief by Mon 6-17-85. deft shall respond by Mon 6-24-85 and deft's mot is RENOTED to Fri 6-28-85. cc: AUSA, DEFT CNSL. (EOD 6-11-85).
June 12	183	ENT (BJR) The trial date of 6-17-85 is VACATED to be rescheduled at a later date.
June 13	184	ENT (PKS) ARRAIGNMENT. DEFT TAYLOR AUSA, S. Dohrmann, Deft Cnsl D. Middaugh tape # S-718, deft present in custody, Deft advises the court he has received a copy of the superseding indict, Deft waives formal reading. Deft advised of charge, Deft entered NOT GUILTY plea to Ct III of the superseding Indict Trial scheduled b4 HON BJR on 8-19-85 at 9:30 a.m. Deft waives 30 day trial limit.
June 11	185	MOTION Govt's for temp release of certain trial exhibits. Noted for 6-21-85.

DATE	DOC. NO.	PROCEEDINGS
June 11	* *8	LODGED Order for temp release of exhibits.
June 11	186	MOTION Govt's to shorten time Noted 6-14-85
June 11	* * *	LODGED Order shortening time.
June 17	188	RESPONSE Gov't supplemental to deft's speedy trial mot.
June 17	189	ORDER (BRJ) Exhibits 1, 2, 4, 6, 8, (a)-(c), 9-15 & 17 may be released to the U.S. for use at trial of coedfendant TAYLOR. cc: AUSA, DEFT CNSL. (EOD 6-18-85).
June 24	191	DECLARATION of Ian G. Loveseth
June 24	192	SUPPL. BRIEF of Def TAYLOR Re: Speedy Trial Motion
July 15	194	ARREST WARRANT of Def. TAYLOR. Executed 3-6-85.
July 18	195	ADDENDUM to Gov't Supplemental Response to Def's Speedy Trial MO.
Aug. 2	197	ORDER (BJR) Def TAYLOR, Granting in part & denying in part Def's MO to Dismiss for STA Violations. Cc & Ent. 8-2-85: AUSA, Def Cnsl.
Aug. 7	198	NOTICE of Gov't of intent to use Def's Statements.
Aug. 7	199	REQUEST of Gov't for Pretrial Discovery.

DATE	DOC. NO.	PROCEEDINGS
Aug. 7	200	REQUEST of Gov't for notice of Dense of Insanity or Diminished Capacity.
Aug. 12	201	TRIAL BRIEF of Gov't
Aug. 13	202	SUPPLEMENTAL TRIAL BRIEF of Gov't.
Aug. 19	203	FINANCIAL AFFIDAVIT
Aug. 19	204	ORDER (PKS) Appointing Cnsl.
Aug. 19	205	ENT (BJR) Def Cnsl Loveseth failed to appear for revision of plea. Continued to 8-23-85, 3:00 p.m.
Aug. 21	206	ENT (BJR) Order appointing Cnsl (PKS) for Def TAYLOR is VACATED. Mr. Robert Wayne will appear @ revision of plea set 8-23-85, 3:00 p.m. w/Mr. Loveseth.
Aug. 23	207	ENT (BJR) REVISION OF PLEA: Def TAYLOR AUSA T. Wales; Def Cnsl Robert Wayne; CR Don Philpott. Def advised or rights & charges. Def pleads GUILTY to Ct. III of Indictment. Sentencing set 10-4-85, 9:30 a.m.
Aug. 23	208	SUBPOENA Judd Iversen (Def TAYLOR)
Aug. 28	209	RETURN by Marshal on J&C.
Aug. 30	210	NOTICE OF APPEAL of Plf. Def. TAYLOR
Sept. 3	* * *	Notice of Appeal sent to CCA

DATE	DOC. NO.	PROCEEDINGS
Sept. 5	213	MO of Ian Loveseth for Leave to Proceed Pro Hac Vice. Ntd 9-27-85, I:
Sept. 20	217	ORDER (JLW) Appointing Cnsl.
Sept. 25	218	SUBPOENAS Ian Loveseth, Unexecuted.
Sept. 27	219	ENT (BJR) Mr. Loveseth's MO for leave to appear pro hac vice GRANTED.
Sept. 30	221	SENTENCING MEMO
Oct. 4	223	ENT (BJR) SENTENCING: Def TAYLOR's guilty plea to Ct. III: AUSA T. Wales; Def Cnsl I. Loveseth; PO R. Wayne; CR M. Ferrell. Def's MO to strike portions of presentence report GRANTED in part & DENIED in part. 5 yrs. jail, w/credit for time served. $50 fine. Court recommends any parole will include provisions prohibiting contact between Def & Marvel Taylor & Robert Goldthwaite. Def's MO for sent. subsection (b) DENIED.
Oct. 11	* * *	Lodged J & C. Def TAYLOR
Oct. 15	225	JUDGMENT & COMMITMENT Def TAYLOR. Cc & Ent. 10-15-85.
Oct. 15	226	ORDER (BJR) Authorizing Payment of Cnsl.

DATE	DOC. NO.	PROCEEDINGS
Oct 22	236	ORDER (BJR) Authorizing Payment of Transcript. Def. TAYLOR
Nov. 15	237	ORDER (CCA) that CR file transcripts/MC for extension of time w/in 7 dys.
Nov. 18	238	TRANSCRIPT DESIGNATION & Ordering of Appellant
Feb. 12	246	MO of Def TAYLOR to Reduce Sent. Ntd 2-21-86 (Cnsl advised)
Feb 12	247	DECLARATION in support of MO of Def TAYLOR
Mar. 8	250	ORDER (CCA) Certificate of Record to be sent & setting sched. Def TAYLOR
Mar. 20	251	DESIGNATION of Clerk's Record as to Def TAYLOR (Appellee)
Apr. 21	252	ORDER (CCA) GRANTING Appellee's MO for extension of time til 4-21-86 to file answering brief. Def. TAYLOR
Apr. 24	253	DESIGNATION of Clerk's Record from Appellee as to Def TAYLOR
Apr. 24	* *	Sent Clerk's Record to CCA as to Def TAYLOR
May 1	* *	Sent Clerk's Record to CCA as to Def TAYLOR
Sept. 24	255	SUBPOENA R.A. Daniel, Exec. 5-29-85, Def TAYLOR

DATE	DOC. NO.	PROCEEDINGS
1987		
July 23	259	ORDER (BJR) DENYING Def TAYLOR's Rule 35 Mtn. Cc & Ent. 7-23-87

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

85-0201M-01

UNITED STATES OF AMERICA

v.

LARRY LEE TAYLOR, DEFENDANT

RELEVANT DOCKET ENTRIES

DATE	DOC. NO.	PROCEEDINGS
03/05/85	1	Filed affidavit in removal proceedings (Rule 40) (MAGISTRATE BRENNAN) (Dkt'd 03/11/85).
03/06/85	2	Magistrate's criminal minutes filed, (TAPE 85-8) (MAGISTRATE BRENNAN) (Dkt'd 03/11/85).
		US Attorney SCHOGGEN, LEIDA R added to case (MAGISTRATE BRENNAN) (Dkt'd 03/11/85).
		Attorney STEPANIAN. MICHAEL added to case (MAGISTRATE BRENNAN) (Dkt'd 03/11/85).
		Defendant's first appearance (MAGISTRATE BRENNAN) (Dkt'd 03/11/85).
		Status hearing set for 03/08/85 @ 9:30 AM (FOR RULE 20 OR 40 STATUS) (MAGISTRATE BRENNAN) (Dkt'd 03/11/85).

DATE	DOC. NO.	PROCEEDINGS
03/08/85	3	Magistrate's criminal minutes filed. (TAPE 85-11) (MAGISTRATE BRENNAN) (Dkt'd 03/11/85).
		Status hearing held (MAGISTRATE BRENNAN) (Dkt'd 03/11/85).
		Status hearing continued to 03/18/85 @ 9:30 AM (RE: RULE 20 STATUS) (MAGISTRATE BRENNAN) (Dkt'd 03/11/85).
	4	Order psychiatric/physical evaluation/examination (MAGISTRATE BRENNAN) (Dkt'd 03/11/85).
		Mark the beginning of a potential excludable period of type X-A starting on 03/08/85 ((In re ORD-PSYXM on 3/8/85)) (Dkt'd 03/11/85).
03/11/85	5	–ORDER REGARDING PHYSICAL EXAMINATION RETURNED EXECUTED ON 3/8/85 (Dkt'd 03/12/85).
03/18/85	6	Magistrate's criminal minutes filed. (TAPE 85-17) (MAGISTRATE BRENNAN) (Dkt'd 03/20/85).
		Status hearing held (RE: RULE 40 STATUS) (MAGISTRATE BRENNAN) (Dkt'd 03/20/85).
		Removal hearing set to 04/03/85 @ 9:30 AM (MAGISTRATE BRAZIL) (Dkt'd 03/20/85).

DATE	DOC. NO.	PROCEEDINGS
04/03/85	7	Magistrate's criminal minutes filed, (TAPE 85-11/12) (MAGISTRATE BRAZIL) (Dkt'd 04/08/85).
		Removal hearing waived (MAGISTRATE BRAZIL) (Dkt'd 04/08/85).
		Order defendant removed to other district (Rule 40) 0981 (MAGISTRATE BRAZIL) (Dkt'd 04/08/85).
	8	Warrant of removal of defendant (Rule 40) issued (MAGISTRATE BRAZIL) (Dkt'd 04/08/85).

Supreme Court of the United States

No. 87-573

UNITED STATES, PETITIONER

v.

LARRY LEE TAYLOR

ORDER ALLOWING CERTIORARI. Filed January 19, 1988.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

U.S. GOVERNMENT PRINTING OFFICE 1988 – 202 037/60805

No. 87-573

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

LARRY LEE TAYLOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

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QUESTION PRESENTED

Whether a minor violation of the time limitations of the Speedy Trial Act of 1974, 18 U.S.C. (& Supp. IV) 3161 *et seq.*, justifies the dismissal with prejudice of an indictment charging a serious crime.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-573

UNITED STATES OF AMERICA, PETITIONER

v.

LARRY LEE TAYLOR

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 821 F.2d 1377. The order of the district court dismissing the indictment with prejudice (Pet. App. 23a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1987. On September 1, 1987, Justice Scalia extended the time in which to file a petition for a writ of certiorari to and including October 11, 1987. The petition was filed on October 7, 1987, and was granted on January 19, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Speedy Trial Act of 1974 provides in pertinent part (18 U.S.C. 3162(a)(2)):

> If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. * * * In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

STATEMENT

1. On July 25, 1984, respondent was charged in a two-count indictment in the United States District Court for the Western District of Washington. The indictment alleged that respondent and two others had conspired to distribute cocaine, in violation of 21 U.S.C. 846, and had possessed 400 grams of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (E.R. 1-2).[1] Trial was scheduled to begin on November 19, 1984, which the parties agreed was one day before the end of the 70-day period allowed for commencing trial under the Speedy Trial Act, 18 U.S.C. 3161(c)(1) (E.R. 13; J.A. 8). On the day of trial, however, respondent failed to appear.

[1] "E.R." refers to the Excerpt of Record filed in the court of appeals. It contains the pleadings, exhibits, and affidavits on which the district court based its ruling on the speedy trial motion. There was no hearing on that motion.

He was declared to be a fugitive, and a bench warrant was issued for his arrest (E.R. 50, 57; J.A. 12).[2]

On February 5, 1985, respondent was arrested by local police officers in San Mateo County, California, for failure to appear on local petty theft charges (E.R. 17, 21, 50). Two days later, the United States District Court for the Northern District of California issued a writ of habeas corpus ad testificandum directing the local authorities to make respondent available to appear as a defense witness in *United States* v. *Seigert*, No. CR-84-0689RFD, a federal narcotics prosecution that was pending in the Northern District of California (E.R. 50). On February 7, 1985, the United States Marshals Service took custody of respondent pursuant to the writ and arranged for him to be held in the San Francisco County jail pending his appearance in the *Seigert* trial (E.R. 50-51). Respondent testified in that case on February 21, 1985, and following his testimony he was held for possible recall in that trial (E.R. 51). The *Seigert* trial ended in a mistrial the following day.

On February 28, 1985, the pending state charges against respondent were dismissed on motion of the district attorney in San Mateo County (E.R. 25, 26, 51). The United States Marshal was notified of the dismissal on the following day, March 1, 1985, which was a Friday (E.R. 51). The State's notice informed the marshal that "effective today [respondent] becomes your prisoner" (*ibid.*).

The following Wednesday (March 6, 1985), respondent made an initial appearance before a federal magistrate in

[2] Respondent and his co-defendants, Ann Angeli and John Romani, had been scheduled to be tried together. After respondent failed to appear, Angeli entered into a plea agreement with the government and the trial of Romani and petitioner was continued until January 15, 1985. On that date, respondent was still a fugitive. Romani was then tried alone by a jury and was convicted on both counts.

the Northern District of California in connection with the bench warrant from the Western District of Washington (E.R. 52). See Fed. R. Crim. P. 40(e). At that time, the magistrate scheduled a further hearing for March 8, 1985, in the proceeding to return respondent to Washington (E.R. 52, 74-81). On March 8, the magistrate, at respondent's request, ordered a physical examination of respondent (E.R. 52, 60, 86-87). At the March 8 hearing, defense counsel also informed the court that he was in no hurry to have respondent returned to Washington. Counsel explained (E.R. 85):

> I assume that we are going to return, Your Honor. What I propose is we set a removal hearing. * * * I would not take the Court's time to have a removal hearing, but I would rather keep him here and organize what is gonna happen and talk to [Assistant U.S. Attorney] Wales up in Seattle.

The court then scheduled a status conference on the removal proceedings for March 18 (E.R. 52, 86). On that date, at respondent's request, the removal hearing was set for April 3 (E.R. 52, 88-89). At the time set for the removal hearing, respondent waived his right to a hearing and was ordered removed to the Western District of Washington (E.R. 52).

During the next 14 days, the marshal, in accordance with standard procedures, assembled several prisoners who had to travel northward. On April 17, 1985, respondent began his trip to Washington. The following day, while respondent was in Oregon on his way back to Washington, the district court in the Northern District of California issued a second writ of habeas corpus ad testificandum, compelling respondent's presence to testify as a defense witness at the retrial in the *Seigert* case (E.R. 44). Petitioner was then promptly returned to San Francisco to testify at that trial. On April 24, while respondent was waiting to testify in the *Seigert* case, a superseding indictment was returned against respondent in the Western District of Washington. E.R. 52-53. The superseding indictment realleged the two pending narcotics charges and added a third count charging respondent with failing to appear before a court as required, in violation of 18 U.S.C. 3150 (E.R. 3-5). The *Seigert* retrial began on May 7, 1985. After respondent's testimony was completed, he was returned to the Western District of Washington on May 17, 1985. E.R. 53. Before he could be retried, he moved to dismiss the superseding indictment, asserting that the delay in bringing him to trial had resulted in a violation of the 70-day time limit of the Speedy Trial Act. E.R. 6-12.

2. The district court granted respondent's speedy trial motion and dismissed the two narcotics counts (Pet. App. 23a-33a).[3] The court and the parties agreed that only one day remained on the speedy trial clock when respondent failed to appear at trial in November 1984.[4] On that

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[3] The court's determination that the Act had been violated applied only to the narcotics counts, which had been included in the original indictment. The court found no speedy trial violation with respect to the failure to appear count that was added in the superseding indictment. Pet. App. 32a-33a. Respondent subsequently pleaded guilty to that count.

[4] That conclusion was based on a now-outmoded method of calculating speedy trial time. Under that method, which was recommended by the Committee on the Administration of the Criminal Law, Judicial Conference of the United States, in its publication, *Guidelines to the Administration of the Speedy Trial Act of 1974, as Amended* 68-70 (rev. 1979, with amendments through Oct. 1984), an "ends of justice" continuance granted under Section 3161(h)(8) would be "tacked on" to the end of the 70-day period; it would not stop the running of the speedy trial clock at the time the continuance was granted. Therefore, when the continuance ended, the speedy trial

understanding, the government had only one day of non-excludable time within which to bring respondent to trial following his capture on February 5, 1985. *Id.* at 26a.

In calculating the number of days that had passed for speedy trial purposes, the district court excluded the 78-day period between respondent's November trial date and his capture in February as time during which respondent was "absent" under Section 3161(h)(3)(A) of the Act. The court also excluded the period between February 7 and February 22 as a period of delay attributable to the pending state charges and respondent's appearance at the first trial in the *Seigert* case. But the court found that the speedy trial clock began to run on February 23, the day after the first *Seigert* trial ended. The court counted the period between February 23 and March 1, even though the state charges were still pending during that time. The court held that that period should be counted because the United States Marshals Service had not formally returned respondent to the custody of the state authorities, even though he was being held in a state facility during that time (Pet. App. 27a-28a). In addition, the court counted the period between March 1 and March 5 as non-excludable time for speedy trial purposes. The court concluded (*id.* at 24a-25a) that once the marshal learned on March 1 that the state charges had been dismissed, the

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period would expire as well. It is now clear that that is not the correct method for calculating speedy trial time. Instead, the courts that have analyzed the issue have held that the grant of a continuance stops the speedy trial clock altogether until the continuance comes to an end. See, *e.g.*, *United States* v. *Gallardo*, 773 F.2d 1496 (9th Cir. 1985); *United States* v. *Campbell*, 706 F.2d 1138 (11th Cir. 1983). Under that method of calculation, there would have been 42 days of speedy trial time left at the time respondent became a fugitive, so that there would have been no speedy trial violation in this case. We did not raise that argument in the courts below, and we therefore do not press it here.

marshal should have brought respondent before a federal magistrate immediately for an initial appearance on the bench warrant. See Fed. R. Crim. P. 40(e). Because the marshal did not bring respondent before a magistrate until March 6, the court refused to exclude that period of delay. Pet. App. 27a-28a.

Applying Section 3161(h)(1)(G), the district court excluded the entire period between respondent's initial appearance on the bench warrant on March 6 and the removal order on April 3 as a period of delay resulting from the removal proceedings. The court excluded the next ten days as a reasonable period of time for transporting respondent back to Washington, under Section 3161(h)(1)(H). The court, however, refused to exclude the full 14 days that it took the marshal to arrange for respondent's transportation back to Washington. In the district court's view, the marshal had improperly elevated his concern for the economies resulting from group transportation over respondent's right to a speedy trial. Finally, the court excluded all the remaining time after respondent was subpoenaed to testify at the second *Seigert* trial as a period of delay resulting from respondent's participation in that trial and his second journey back to Washington. Pet. App. 28a-29a.

Based on that analysis, the district court concluded that a total of 15 non-excludable days had elapsed between respondent's apprehension in February and his ultimate return to Washington for trial. Because the parties agreed that there was only one day left on the speedy trial clock when respondent absconded, the court found that the 70-day limit of the Act had been exceeded by 14 days and that the indictment therefore had to be dismissed. Pet. App. 29a.

The district court then considered whether to dismiss the indictment with or without prejudice. The court acknowl-

edged that the offenses at issue were serious, but it held that the circumstances leading to the Speedy Trial Act violation tended "strongly to support the conclusion that the dismissal must be with prejudice" (Pet. App. 30a). The court characterized the government's behavior after respondent's recapture as "lackadaisical" (*ibid.*). In making that characterization, the court pointed to the government's failure to return respondent to state custody after his first appearance in *Seigert*, the five-day delay between the dismissal of the state charges and respondent's appearance in connection with the removal proceedings, and the 14-day delay after the removal order before respondent was sent back to Washington (*ibid.*). Based on the government's conduct, the court concluded that the indictment had to be dismissed with prejudice, or else "the [Speedy Trial Act] would become a hollow guarantee" (*id.* at 31a).

3. The court of appeals affirmed in a divided opinion (Pet. App. 1a-22a). With respect to the question whether the Speedy Trial Act had been violated, the court of appeals agreed with the district court that the Act's 70-day limit had been exceeded by 14 days (*id.* at 16a). On the issue of remedy, the court then upheld the district court's decision to dismiss the indictment with prejudice. It addressed the factors enumerated in Section 3162(a)(2) and acknowledged that several of those factors seemed to favor dismissal without prejudice. For instance, the court agreed with the district court that the offenses were serious. The court also conceded that the length of the delay was "not so great as to mandate dismissal with prejudice" (Pet. App. 17a). And the court found "no indication" that the delay had impaired respondent's ability to defend against the narcotics charges. Nonetheless, the court asserted that respondent had suffered prejudice because he was incarcerated during the entire period

(*ibid.*). Moreover, the court concluded that the purpose of the district court's order was to send "a strong message to the government" that the Speedy Trial Act "must be observed, despite the government's apparent antipathy toward a recaptured fugitive" (*id.* at 18a). For that reason, the court concluded that the district court had not abused its discretion by entering a "with prejudice" dismissal.

Judge Poole dissented on the remedy issue. In his view, the district court had abused its discretion by dismissing the indictment with prejudice (Pet. App. 19a). Judge Poole found that the government was not at fault for any of the delay before March 1, when the marshal learned that the state charges had been dismissed.[5] Noting that the marshal had learned about the dismissal of the state charges on a Friday, Judge Poole further concluded that the marshal could not be charged with neglect for failing to bring respondent before a magistrate until the following week (*id.* at 21a). Judge Poole also explained (*id.* at 21a-22a) that it took the marshal 14 days rather than 10 days to transport respondent back to Washington after his removal hearing because of the need "to collect a larger number of prisoners for simultaneous transport in order to effect economy of expenses."

In light of these considerations, Judge Poole concluded that the delay in the case, although not excludable under the statute, was not "of such studied, deliberate, and callous nature as to justify dismissal with prejudice" (Pet.

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[5] Judge Poole observed that the San Mateo authorities could have obtained custody of respondent, who was incarcerated during and after the *Seigert* trial in the San Francisco County jail, simply by asking the marshal to sign the required papers. Furthermore, Judge Poole concluded that the government could not be faulted for failing to return respondent to Washington during that period, since the California state charges were still pending at that time. Pet. App. 20a-21a.

App. 22a). Judge Poole further found it incongruous that by fleeing the day before his scheduled trial, respondent became "the instrument of his own deliverance" (*ibid.*). As Judge Poole explained (*ibid.*), respondent "created his own 78-day 'excludable time' by his own will, traveling from Seattle to California where he became the subject of criminal charges in two jurisdictions 800 miles away from the place of trial." Judge Poole found it "ironic that the statutory scheme which would have assured his orderly trial in November 1984, is resorted to, five months later, as the reason for 'springing' him to freedom and conferring upon him complete absolution from further prosecution" (*ibid.*). To release respondent altogether because of the minor violation of the Speedy Trial Act, Judge Poole concluded, "reflects badly upon our notions of sound, evenhanded administration of justice" (*ibid.*).

SUMMARY OF ARGUMENT

Section 3162(a)(2) of the Speedy Trial Act provides that in the event of a violation of the 70-day time limit of the Act, a court must dismiss the charges on motion of the defendant. It does not, however, require that the indictment be dismissed with prejudice. Instead, it provides that in determining whether to permit reprosecution, the court must consider several factors, including the seriousness of the offense, the facts and circumstances of the case, and the effect of reprosecution on the administration of justice and the administration of the Speedy Trial Act.

The provision authorizing dismissals to be made without prejudice was the subject of close congressional attention; without that provision, the sponsors acknowledged, the Act would not have had sufficient support in Congress to pass. Both the language of Section 3162(a)(2) and its legislative history make it clear that Congress did not intend for courts routinely to dismiss indictments with

prejudice whenever a Speedy Trial Act violation is found. Nor is it consistent with the statute for courts to dismiss indictments with prejudice solely on the ground that dismissals with prejudice will be more effective than dismissals without prejudice in inducing the government to take care to avoid Speedy Trial Act violations in the future. Instead, the statute specifically requires the courts to consider each of several factors bearing on the question whether reprosecution should be permitted.

In this case, virtually every pertinent factor cuts in favor of permitting reprosecution. The crimes at issue were serious, as the district court and the court of appeals acknowledged. The period of delay was quite short—only eight days according to our calculation, and only 14 days even according to the district court's calculation. Respondent suffered no prejudice of any sort from the delay: he was not injured in his ability to defend himself at trial, and the delay did not result in any additional period of incarceration, since he was being held during the same period in connection with the bench warrant for failing to appear at his trial in Washington, as to which there was no Speedy Trial Act violation. Moreover, while the district court and the court of appeals regarded the government as being at fault for the short period of pretrial delay that occurred during the process of returning respondent from California to Washington, those courts ignored the fact that it was respondent himself who ultimately caused that delay by fleeing from Washington prior to trial. Respondent indulged in self-help to avoid a speedy trial by fleeing the jurisdiction; his subsequent complaint about the government's negligence in arranging for his prompt return to Washington must be assessed in light of his own role in the matter. Finally, to bar reprosecution would adversely affect the administration of justice by creating an additional and improper incentive for indicted defend-

ants to flee, and by disserving the public interest in seeing that serious narcotics offenders are punished, rather than being released without a fair determination of their guilt.

The only factor cutting in favor of dismissal with prejudice in this case is the effect of such a dismissal on the administration of the Speedy Trial Act, *i.e.*, the didactic effect of a "with prejudice" dismissal in encouraging the government to comply with the requirements of the Act. That factor, however, can always be invoked in favor of dismissing cases with prejudice, since dismissals with prejudice invariably put more pressure on the government to comply with the Act than do dismissals without prejudice. To attach virtually conclusive weight to that factor, as the courts below did in this case, is to ignore the balancing test created by Section 3162(a)(2). Rather than complying with the statutory directive, the approach employed by the courts below was more consistent with the legislative proposals that Congress rejected, which would have required dismissals with prejudice in all or virtually all cases.

Although district courts enjoy discretion under Section 3162(a)(2) to decide whether Speedy Trial Act dismissals should be with or without prejudice, the courts abuse that discretion if they fail to give meaningful consideration to each of the statutory factors set forth in Section 3162(a)(2), or if they commit a clear error of judgment in weighing those factors. In this case, the district court committed both errors when it failed to attach significant weight to the several factors that favored dismissal without prejudice, and when it held that a "with prejudice" dismissal was appropriate even though this case, by any fair assessment, is an extremely strong candidate for dismissal without prejudice. Indeed, it is difficult to imagine how the case for dismissal without prejudice could be much stronger than it was in this case; if dismissal with prejudice is appropriate here, then either a district court's

decision to select that remedy is effectively unreviewable or Section 3162(a)(2) must be read as incorporating a strong presumption against reprosecution.

ARGUMENT

A MINOR VIOLATION OF THE TIME LIMITATIONS OF THE SPEEDY TRIAL ACT DOES NOT JUSTIFY THE DISMISSAL WITH PREJUDICE OF AN INDICTMENT CHARGING A SERIOUS CRIME

The Speedy Trial Act of 1974, 18 U.S.C. (& Supp. IV) 3161 *et seq.*, provides that trial must commence within 70 days of the filing of charges or the defendant's first appearance in the charging district. 18 U.S.C. 3161(c)(1). If the defendant shows that the trial has not begun within that 70-day period, not counting periods of delay that are excludable under the Act (see 18 U.S.C. (& Supp. IV) 3161(h)(1)-(9)), the charges must be dismissed.[6] The Act, however, does not require that the indictment be dismissed with prejudice. Instead, Section 3162(a)(2) of the Act provides that a dismissal for violation of the 70-day time limit

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[6] Where the defendant alleges a violation of the 70-day indictment-to-trial period, dismissal is mandatory only if the defendant moves for dismissal on statutory speedy trial grounds prior to trial. If he does not, he has waived his right to dismissal under the Act. *United States* v. *Andrews*, 790 F.2d 803, 809-810 (10th Cir. 1986), cert. denied, No. 86-5960 (Apr. 20, 1987); *United States* v. *Ballard*, 779 F.2d 287, 294 (5th Cir.), cert. denied, 475 U.S. 1109 (1986); *United States* v. *Tenorio-Angel*, 756 F.2d 1505, 1508 (11th Cir. 1985); *United States* v. *Tercero*, 640 F.2d 190, 195 (9th Cir. 1980), cert. denied, 449 U.S. 1084 (1981); *United States* v. *Little*, 567 F.2d 346, 349 (8th Cir. 1977), cert. denied, 435 U.S. 969 (1978). The defendant bears the burden of proof in establishing that there has been a violation of the 70-day time limit. 18 U.S.C. 3162(a)(2); *United States* v. *Melguizo*, 824 F.2d 370, 372 (5th Cir. 1987), petition for cert. pending, No. 87-551.

may be with or without prejudice to any reprosecution.[7] To determine which sanction is appropriate in a particular case, Section 3162(a)(2) sets forth a balancing test that the court must employ. It requires the court to consider each of the following factors, among others: "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the Speedy Trial Act] and on the administration of justice."[8]

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[7] A similar scheme applies to the provision of the Act that requires that an indictment be returned within 30 days of the defendant's arrest on a federal complaint. 18 U.S.C. 3161(b). When the 30-day arrest-to-indictment limit is exceeded, the indictment must be dismissed, but the dismissal need not be with prejudice. 18 U.S.C. 3162(a)(1). Compare, *e.g.*, *United States* v. *Caparella*, 716 F.2d 976 (2d Cir. 1983) (with prejudice), with *United States* v. *Carreon*, 626 F.2d 528, 534 (7th Cir. 1980) (without prejudice) and *United States* v. *Bittle*, 699 F.2d 1201, 1207-1208 (D.C. Cir. 1983) (same).

[8] By contrast, when a defendant's rights under the Sixth Amendment's Speedy Trial Clause have been violated, dismissal with prejudice is "the only possible remedy." *Strunk* v. *United States*, 412 U.S. 434, 440 (1973), quoting *Barker* v. *Wingo*, 407 U.S. 514, 522 (1972). There are, of course, fundamental differences between a Sixth Amendment speedy trial violation and a statutory Speedy Trial Act violation. To give rise to a constitutional violation, the delay between indictment and trial ordinarily must be substantial, while a Speedy Trial Act violation can occur after the passage of as little as 71 days between indictment and trial. In addition, a court reviewing a constitutional speedy trial claim must consider not only the length of the delay, but also the relative culpability of the parties in causing the delay, the defendant's assertion of his right to a speedy trial, and the prejudice, if any, to the defendant. *Barker* v. *Wingo*, 407 U.S. at 530. Usually, a Sixth Amendment violation will be found only where the defendant has been prejudiced by extraordinary delay that he did not cause. A Speedy Trial Act violation, by contrast, results merely from the passage of more than 70 days of nonexcludable time between indictment and trial. Factors such as the relative culpability of the parties, the length of the delay, and prejudice to the defendant do not go to the question whether there has been a violation, or whether there should be a dismissal, but whether the dismissal should be with or without prejudice.

The district court purported to apply this statutory balancing test. In fact, however, the court entered a "with prejudice" dismissal for only one reason: because, in the court's view, the government had acted in a "lackadaisical" manner in arranging for the removal proceedings and respondent's return to Washington (Pet. App. 30a). To permit the government to reindict respondent, the court concluded, would "tacitly condone[]" the government's conduct and render the Speedy Trial Act a "hollow guarantee" (*id.* at 30a-31a).

The court of appeals, like the district court, recognized that several of the factors bearing on the statutory balancing test favored dismissal without prejudice: the crimes at issue were serious (Pet. App. 16a, 30a); the period of delay was not lengthy (*id.* at 16a-17a); and the delay did not result in any apparent prejudice to respondent's ability to prepare a defense at trial (*id.* at 17a). Nonetheless, the court of appeals held that the district court's rationale—"to send a strong message to the government that the [Speedy Trial Act] must be observed" (*id.* at 18a)—was a sufficient justification for a "with prejudice" dismissal, even in the face of all the factors that favored a dismissal without prejudice. We submit that dismissing an indictment with prejudice for didactic reasons alone is inconsistent both with the terms of the statute and with the policies that Congress sought to promote when it adopted the balancing test of Section 3162(a)(2).

A. Dismissal With Prejudice Is Not Justified Under Section 3162(a)(2) Simply to Encourage Compliance With the Speedy Trial Act

When it enacted the Speedy Trial Act of 1974, Congress intended first and foremost to protect the public's right to speedy justice. As the 1974 House Report stated, "[t]he purpose of this bill is to assist in reducing crime and the danger of recidivism by requiring speedy trial." H.R. Rep. 93-1508, 93d Cong., 2d Sess. 8 (1974). The specific time limits for bringing a case to trial were selected on the basis of studies showing "the amount of time it takes an individual who is on bail to be rearrested for a subsequent crime" (*id.* at 14). Accord S. Rep. 93-1021, 93d Cong., 2d Sess. 8 (1974). The time limits were thus chosen principally to reduce repeat offenses. To ensure that the government would adhere to the time limits and thereby protect the public's interest in a swift resolution of the issue of guilt, Congress required that any violation of the time limits would result in dismissal of the charges.[9]

Prior to the Act's passage, no provision engendered more controversy than the dismissal sanction. A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, at 31-33 (Fed. Judicial Center 1980). The

[9] Only violations of the 30-day arrest-to-indictment time limit and the 70-day indictment-to-trial time limit require dismissal of the indictment. The mandatory dismissal sanction does not apply to violations of the 90-day limit on continuous pretrial confinement (18 U.S.C. 3164; see *United States* v. *Theron*, 782 F.2d 1510, 1515-1516 (10th Cir. 1986)); violations of the requirement that the government promptly notify a prisoner who is serving a sentence elsewhere that he has a right to a speedy trial on the pending federal charges (18 U.S.C. 3161(j); see *United States* v. *Anderton*, 752 F.2d 1005, 1008 (5th Cir. 1985)); and violations of the requirement that trial not commence less than 30 days following the defendant's first appearance with counsel (18 U.S.C. 3161(c)(2); see *United States* v. *Daly*, 716 F.2d 1499, 1506 (9th Cir. 1983), cert. dismissed, 465 U.S. 1075 (1984)).

debate focused on two countervailing concerns. Some of the sponsors of the legislation believed that in the absence of an absolute discharge for the defendant, the time limits of the Act would be merely precatory. See, *e.g.*, *Speedy Trial: Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 21 (1971) [hereinafter *1971 Senate Hearings*]. (testimony of Sen. Hart) Thus, the House bill, H.R. 17409, 93d Cong., 2d Sess. § 101 (1974), provided that a speedy trial dismissal "shall forever bar prosecution of the individual for that offense or any offense based on the same conduct." The Senate bill was nearly as stringent. It permitted reindictment only where "the attorney for the government has presented compelling evidence that the delay was caused by exceptional circumstances." S. 754, 93d Cong., 2d Sess. § 101 (1974).

The opponents of these harsh sanctions feared that in light of the relatively short time limits for bringing a defendant to trial, a bar to reprosecution would in many cases unreasonably permit a criminal to escape punishment. See, *e.g.*, *Speedy Trial: Hearings on S. 754 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 166 (1973) (statement of Sen. McClellan) (violation of the time limits "ought not to result in a guilty man going free"); *id.* at 139-140 (statement of Dallin H. Oaks) ("[T]he sanction of mandatory dismissal with prejudice is too radical. * * * There must be equally effective and far less costly ways of controlling the actions of dedicated public servants."). See also *1971 Senate Hearings* 195-196 (letter from Richard H. Seeburger); *id.* at 159 (letter from Edward L. Barrett). During the 1974 House Hearings, a member of the Advisory Committee of United States Attorneys proposed that a balancing test be used to determine whether reprose-

cution should be barred. *Speedy Trial Act of 1974: Hearings on S. 754, H.R. 7873, H.R. 207, H.R. 658, H.R. 687, H.R. 773 and H.R. 4807 Before the Subcomm. on Crime of the House Comm. on the Judiciary,* 93d Cong., 2d Sess. 207 (1974) [hereinafter *1974 House Hearings*]. (statement of James L. Treece) That balancing test would focus on the seriousness of the offense, the fault of the prosecutor, and the prejudice to the defendant (*ibid.*). Such a test would ensure that the criminal did not go free simply because there had been "technical noncompliance" with the time limits of the Act (*id.* at 214).

The bill's sponsors recognized that Congress would not pass the proposed speedy trial legislation unless the stringent dismissal sanction was relaxed. See *1974 House Hearings* 161 (testimony of Sen. Ervin) ("on the Senate side opposition to [an unqualified] dismissal with prejudice provision was so intense that passage would have been impossible with such a provision"). The bill was therefore amended on the floor of the House to include the provision that became Section 3162(a)(2). See 120 Cong. Rec. 41774-41775, 41778, 41793-41794 (1974) (remarks of Rep. Cohen). There was no opposition to the amendment voiced during the debates.[10] Instead, because many persons feared that the speedy trial bill "would turn criminals loose" (*id.* at 41778 (remarks of Rep. Anderson)), the sponsors of the bill warned that the amendment "must be adopted if the bill is to pass" (*ibid.* (remarks of Rep. Wiggins)). See also *id.* at 41794 (remarks of Rep. Conyers).

[10] Indeed, other amendments were proposed that would have further reduced the instances in which dismissal with prejudice could be ordered. See, *e.g.*, 120 Cong. Rec. 41782 (1974) (remarks of Rep. Frenzel) (supporting an amendment that would "require mandatory dismissal with prejudice only in those cases where there has been extreme Government delay in prosecution").

Most of the discussion of the amendment was devoted to clarifying the content of the factors the courts were directed to consider. Congressman Dennis proposed that the amendment be modified to require explicitly that a court consider "the degree of prejudice to the defendant's ability to prepare his case" (120 Cong. Rec. 41794 (1974)). Congressman Wiggins (one of the bill's sponsors) explained, however, that the amendment, as written, would permit the court to take prejudice into account (*id.* at 41778):

> No factor, nor combination of factors, requires * * * a particular form of dismissal. In most cases it is to be expected that no dismissal with prejudice will be ordered unless actual prejudice to the defendant can be shown occasioned by the further delay implicit in a refiling in the case against him, and that actual prejudice to the defendant outweighs societal interests in prosecuting the alleged offender.

Congressman Cohen, the author of the amendment that created the balancing test, feared that if prejudice were listed, it would become the only factor considered by the courts. But he too agreed that prejudice could be taken into account (*ibid.*). See also *id.* at 41795 (remarks of co-sponsor Rep. Conyers) (prejudice is "a factor that would be considered"). After it was uniformly agreed that prejudice was a factor that could be weighed in the balance, the amendment was adopted without further modification (*id.* at 41619, 41796).

The dismissal sanction was initially scheduled to take effect on July 1, 1979. 18 U.S.C. (1976 ed.) 3163(c). In that year, Congress postponed the effective date of the Act for an additional year to give the parties and the courts more time to become accustomed to the stringent time limits of the Act. 18 U.S.C. 3163(c). Congress did not, however, modify the dismissal sanction itself. Instead, the Senate

Report reiterated that the court "must consider" the factors enumerated in Section 3162(a)(2) before choosing a sanction. S. Rep. 96-212, 96th Cong., 1st Sess. 9 (1979). And the Report summarized the derivation of the sanction provision as finally adopted in 1974 (*ibid.*):

> despite the fact that both this Committee and the House Committee on the Judiciary recommended dismissal sanctions of greater severity, the Congress acceded to the position advanced by the Department of Justice that society's interests would be better served by assuring that the prospect of leaving serious criminal conduct unpunished for the sake of speed alone would not occur.[11]

Several points that bear on this case are clear from the language and legislative history of Section 3162(a)(2).

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[11] In discussing the suspension of the dismissal sanction, the House Report stated in passing (H.R. Rep. 96-390, 96th Cong., 1st Sess. 8-9 (1979)):

> While the Act does permit dismissal without prejudice, extensive use of this procedure could undermine the effectiveness of the act and prejudice defendants, and the committee intends and expects that use of dismissal without prejudice will be the exception and not the rule.

Because Congress was not at that time considering a modification to Section 3162(a)(2), the observation in the 1979 House Report, made five years after the enactment of the sanctions provision, is not entitled to much weight. See *South Carolina* v. *Regan*, 465 U.S. 367, 378 n.17 (1984); *Weinberger* v. *Rossi*, 456 U.S. 25, 35 (1982); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980). It cannot override the contrary contemporaneous legislative history from 1974 that led to the enactment of the sanctions provision as it exists today. In 1974, Congress specifically rejected the Senate bill, which limited reprosecution to exceptional cases. Moreover, the one-sentence remark in the 1979 House Report is especially unenlightening as an indication of prior congressional intent, because it is squarely contradicted by the discussion of the same point in the 1979 Senate Report, which is quoted in the text.

First, the dismissal-without-prejudice option is a central feature of the Speedy Trial Act. While the Senate and House committees believed that dismissal with prejudice was necessary to put teeth into the Speedy Trial Act, Congress as a whole did not share that view. As the debates revealed, many members of Congress believed that complete absolution for the criminal is too severe a sanction for a nonprejudicial violation of the Act's stringent time limits, and that view prevailed. Congress specifically rejected the sanction provisions contained in both committee bills, which would have required dismissal with prejudice in all or almost all cases.

Second, the language of the Act and its legislative history make clear that the statute does not incorporate a presumption in favor of dismissals with prejudice. On the contrary, the premise of the amendment to the sanctions provision was that dismissals without prejudice would be an adequate sanction for most statutory speedy trial violations. The courts of appeals that have addressed the issue have agreed that the version of Section 3162(a)(2) that Congress enacted was designed to reject the presumption in favor of dismissal with prejudice that had been a feature of the Senate bill. See *United States* v. *Salgado-Hernandez*, 790 F.2d 1265, 1267 (5th Cir. 1986), cert. denied, No. 86-5229 (Nov. 17, 1986); *United States* v. *Brown*, 770 F.2d 241, 244 (1st Cir. 1985), cert. denied, 474 U.S. 1064 (1986); *United States* v. *Caparella*, 716 F.2d 976, 978-980 (2d Cir. 1983).

Third, Congress intended that prejudice to the defendant would be one of the factors bearing on whether the dismissal should be with or without prejudice. That much is apparent from the language of Section 3162(a)(2), which requires the court to consider the impact of reprosecution on the administration of justice, and it is clear from the House debates, where the sponsors agreed that prejudice

to the defendant was a proper factor to consider in deciding whether to bar reprosecution. Again, the courts of appeals that have addressed the point have agreed that prejudice to the defendant is a factor that should be taken into account in making the Section 3162(a)(2) determination. See *United States* v. *Peeples*, 811 F.2d 849, 851 (5th Cir. 1987); *United States* v. *Phillips*, 775 F.2d 1454, 1455-1456 (11th Cir. 1985); *United States* v. *Brown*, 770 F.2d 241, 244 (1st Cir. 1985), cert. denied, 474 U.S. 1064 (1986); *United States* v. *Bittle*, 699 F.2d 1201, 1208 (D.C. Cir. 1983); *United States* v. *Carreon*, 626 F.2d 528, 533-534 (7th Cir. 1980).

Fourth, and perhaps most important, Section 3162(a)(2) does not permit a court to bar reprosecution based on the consideration of only a single factor, such as the effect that permitting reprosecution would have on encouraging compliance with the Speedy Trial Act. The failure to weigh each of the statutory factors would violate the plain terms of the statute, which directs that a court "*shall consider*, among others, *each* of the following factors" (18 U.S.C. 3162(a)(2) (emphasis added)). Moreover, the adoption of Section 3162(a)(2) in place of the more stringent committee proposals was a clear indication that Congress did not agree with the view expressed in the committee reports that dismissal with prejudice was necessary to ensure compliance with the Speedy Trial Act. Under Section 3162(a)(2), the effect of a "with prejudice" dismissal on the administration of the Speedy Trial Act, *i.e.*, the degree to which an absolute bar to reprosecution would encourage compliance with the Act, was demoted from an irrebutable (House bill) or nearly irrebuttable (Senate bill) presumption to simply one of several competing considerations to be taken into account in determining whether dismissal is appropriate. In sum, the language and background of Section 3162(a)(2) makes quite clear that

the perceived didactic effect of a bar to reprosecution is not enough to justify that remedy if the other considerations favor dismissal without prejudice.[12]

B. The Balancing Test, When Applied to the Facts of This Case, Requires Dismissal Without Prejudice.

1. We do not contest the conclusion of both courts below that the Speedy Trial Act was violated in this case and that dismissal of the indictment was therefore mandatory.

The courts below identified three periods of nonexcludable delay: the six days between the conclusion of the first *Seigert* trial and the dismissal of the state charges; the five days between the date on which the federal marshals were notified of the state court dismissal and the date on which respondent was taken before a federal magistrate on the outstanding bench warrant; and the four days of extra travel time on the first attempt to return respondent to Washington.

Although the matter is not free from doubt, we do not argue here that the entire period attributable to the removal proceedings was excludable from the 70-day pre-

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[12] Another provision of the statute, 18 U.S.C. 3162(b), also supports the view that teaching the government a lesson is not, in and of itself, a sufficient basis for dismissing an indictment with prejudice. Section 3162(b) permits the court to punish the dilatory prosecutor by fining him up to $250, by suspending him from practice for a period of up to 90 days, or by filing a report concerning the prosecutor with an appropriate disciplinary committee. 18 U.S.C. 3162(b)(C), (D), and (E). In most instances, these penalties will have a greater didactic effect than dismissing an indictment with prejudice. And when the prosecutor is punished directly, society does not suffer the effects, as it does when a criminal is granted complete absolution for his offense on a ground unrelated to his guilt.

trial period.[13] We do, however, assert that the courts below erred in refusing to exclude the period between the conclusion of the first *Seigert* trial (February 22) and the day on which the state charges were dismissed (February 28). The Speedy Trial Act does not require the marshal to interfere with state proceedings. Accordingly, he was under no obligation to return respondent to Washington before the state charges were dropped. 18 U.S.C. 3161(h)(1)(D); *United States* v. *Bigler*, 810 F.2d 1317, 1320-1321 (5th Cir. 1987), cert. denied, No. 86-7083 (Oct. 5, 1987); *United States* v. *Redmond*, 803 F.2d 438, 440 (9th Cir. 1986), cert. denied, No. 86-6584 (Apr. 20, 1987); *United States* v. *O'Bryant*, 775 F.2d 1528, 1532 (11th Cir. 1985); *United States* v. *Rodriguez-Franco*, 749 F.2d 1555, 1559 n.2 (11th Cir. 1985); *United States* v. *Lopez-Espindola*, 632 F.2d 107, 109-111 (9th Cir. 1980); *United States* v. *Goodwin*, 612 F.2d 1103, 1105 (8th Cir.), cert. denied, 446 U.S. 986 (1980). The district court did not suggest that the marshal should have returned respondent to Washington during that period. The court, however, faulted the marshal for not moving respondent from the San Francisco County jail to the county jail in neighboring San Mateo County, where the state charges were pending. But such a move was unnecessary and should have no effect on the speedy trial calculations. The sheriff in San Francisco was under court order to deliver respondent to San Mateo authorities upon request. E.R. 20. The marshal's failure to move respondent to San Mateo County in no way impeded the State's ability to prosecute respondent on the local charges.

[13] We note that 18 U.S.C. 3161(h)(1)(G), which excludes delay attributable to a defendant's removal from one district to another, has been construed in guidelines adopted by the Judicial Conference and the Second Circuit as excluding the entire period from a defendant's arrest or capture until his first post-removal appearance in the charging district. See Committee on the Administration of the Criminal Law, Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, as Amended* 38-40 (rev. 1979, with amendments through Oct. 1984); Second Circuit Judicial Council Speedy Trial Act Coordinating Comm., *Guidelines Under the Speedy Trial Act* 18-20 (1979), *reprinted in The Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 386-436 (1979). Under this interpretation, all the delay until respondent first appeared in court in Washington following his flight would be excluded, and there would have been no violation here. Because neither court below considered this interpretation of Section 3161(h)(1)(G), we do not urge it in this Court.

We do not here dispute the district court's conclusion that the other two periods were chargeable. Although the marshal learned at some time on Friday, March 1, 1985, that the outstanding state charge had been dismissed, respondent was not taken before a federal magistrate for an initial appearance on the bench warrant until the following Wednesday, March 6. The district court counted that period as constituting a five-day delay for speedy trial purposes. Second, Section 3161(h)(1)(H) of the Act establishes a presumption that any transportation time in excess of 10 days is unreasonable, and the marshal did not arrange for respondent's transportation to Washington after the first *Seigert* trial until 14 days after the removal order. Although we believe that in an appropriate case the presumption can be rebutted by showing that the extra time taken was justified by economic or security considerations, we do not contend that such a showing was made here. Accordingly, because the marshal took four more days than the Act generally allows to return the fugitive respondent to the charging district, we do not challenge the decision of the lower courts to count those four days.

Under this analysis, we acknowledge that nine speedy trial days elapsed after respondent's capture. When added to the 69 days that the parties agreed had elapsed before respondent absconded, the 70-day limit of the Act was exceeded by eight days. Accordingly, dismissal had to be ordered, and the district court had to consult the balancing test of Section 3162(a)(2) to determine whether the dismissal should be with or without prejudice.

2. When the statutory factors that comprise the mandatory balancing test are weighed, the scale tips heavily in favor of dismissal without prejudice.

The first factor in the test is the seriousness of the offense. As both courts below agreed, conspiracy to distribute cocaine and possession of cocaine with the intent to distribute it are serious crimes. See also *United States* v. *May*, 819 F.2d 531, 535 (5th Cir. 1987); *United States* v. *Simmons*, 786 F.2d 479, 485 (1986), vacated on other grounds, 812 F.2d 818, 819 (2d Cir. 1987); *United States* v. *Brown*, 770 F.2d at 244; *United States* v. *Carreon*, 626 F.2d at 533-534. The courts of appeals have held that where the offense is serious, the indictment should be dismissed only for a "correspondingly serious" delay in violation of the Act. *United States* v. *Salgado-Hernandez*, 790 F.2d at 1268; *United States* v. *Simmons*, *supra*; *United States* v. *Phillips*, 775 F.2d at 1455-1456; *United States* v. *Hawthorne*, 705 F.2d 258, 260-261 (7th Cir. 1983); *United States* v. *Carreon*, *supra*. Here, however, the delay in our view was eight days, and even in the district court's view it was only 14 days. That period of delay is not "correspondingly serious." See, *e.g.*, *United States* v. *Brown*, *supra* (35-day delay not serious); *United States* v. *Hawthorne*, *supra* (9-day delay not serious); *United States* v. *Melguizo*, 824 F.2d 370, 372 (5th Cir. 1987), petition for cert. pending, No. 87-551 (same); *United States* v. *Bittle*, 699 F.2d at 1208 (13-day delay not serious). Compare *United States*

v. *Stayton*, 791 F.2d 17, 21-22 (2d Cir. 1986) (23-month delay serious); *United States* v. *Russo*, 741 F.2d 1264, 1267 (11th Cir. 1984) (several-month delay serious). As the Seventh Circuit has noted, where Congress has provided for alternative sanctions "the purpose of the Act would not be served by requiring the court to impose the maximum sanction for a minimum violation." *United States* v. *Hawthorne*, 705 F.2d at 261. Hence, the first factor in the balancing test strongly favors dismissal without prejudice.

The second factor—the circumstances that led to the dismissal—also strongly favors dismissal without prejudice. The delays here were not attributable to any intentional government misconduct or even negligence that resulted in prejudice to respondent. See *United States* v. *Miranda*, 835 F.2d 830, 834-835 (11th Cir. 1988). Cf. *United States* v. *Loud Hawk*, 474 U.S. at 315-317. Moreover, any delay in the date of respondent's trial was ultimately the product of respondent's failure to appear on the scheduled day of trial, not any default on the part of the prosecution. The government was prepared to go to trial, as scheduled, on November 19, 1984. The government did nothing to postpone that trial date. Respondent, however, was obviously less interested in speedy justice. Rather than submit to the jurisdiction of the court for a swift adjudication of his guilt or innocence, respondent fled, thereby postponing the proceedings indefinitely. It was respondent's fault that the marshal had to be called in, upon respondent's capture by state authorities, to undo what respondent had done by absconding from the site of the trial.

For purposes of this case, we do not dispute that the marshal was slower in performing this task than the Speedy Trial Act permits. But it was respondent—not the marshal—who was principally responsible for the loss of the opportunity for a speedy trial. And it was respondent, not the marshal, who violated the public's right to speedy

justice by his flight from prosecution. A defendant who deliberately delays his trial should rarely, if ever, be entitled to the ultimate, irrevocable sanction of dismissal with prejudice. *United States* v. *Peeples*, 811 F.2d at 851; *United States* v. *McAfee*, 780 F.2d 143, 146 (1st Cir. 1985), vacated on other grounds, No. 85-1959 (Oct. 6, 1986), on remand, 808 F.2d 862 (1st Cir. 1986). Cf. *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970) (flight "disentitles the defendant to call upon the resources of the Court for [a] determination of his claims"). As the dissenting judge below observed, the Speedy Trial should not be interpreted to let a defendant "be the instrument of his own deliverance" (Pet. App. 22a). In sum, the "facts and circumstances of the case which led to the dismissal" indicate that the second factor in the balancing test favors a dismissal order permitting reprosecution.

Finally, by the terms of Section 3162(a), the courts are required to consider "the impact of a reprosecution on the administration of [the Speedy Trial Act] and on the administration of justice." A reprosecution in this case would serve the administration of justice in several ways. First, it would send a message to defendants that they will not profit by absconding. They cannot flout the public's right to speedy justice and expect to gain complete absolution when their flight results in a technical violation of the Act.[14] Second, a reprosecution would serve the public's in-

[14] It is no answer to say, as did the court of appeals (Pet. App. 10a-11a), that defendants who abscond are still subject to prosecution for absconding. Defendants flee because they believe they have a good prospect of avoiding any prosecution at all – either for the underlying charges or for the additional crime of absconding. To add to that calculus the chance that the underlying charges will be dismissed on speedy trial grounds only increases the incentive to flee, particularly where – as in this case – the maximum sentence for failure to appear is lower than the maximum sentence for the charges from which the defendant is fleeing.

terest in seeing that narcotics offenders are justly punished and not released on grounds unrelated to their guilt. See *Barker* v. *Wingo*, 407 U.S. at 519-521; cf. *Arizona* v. *Washington*, 434 U.S. 497, 505 (1978).

In addition, as we have noted, the impact of a reprosecution on the administration of justice includes the prejudice to the defendants, if any, caused by the Speedy Trial Act violation. Respondent has never claimed that his ability to defend against the charges has been impaired by the delay in returning him to Washington for trial.[15] In fact, it is more often the government, not the defendant, that suffers prejudice to its case as a result of delays in the date of trial. See *United States* v. *Loud Hawk*, 474 U.S. at 315 ("[D]elay is a two-edged sword. It is the government that bears the burden of proving its case beyond a reasonable doubt. The passage of time may make it difficult or impossible for the government to carry this burden.") In this case, that general rule held true: the government was put to the trouble of assembling its witnesses and preparing its case in November, when respondent did not appear for trial. The government then had to assemble its witnesses again and prepare for trial in January, when respondent's co-defendant was tried alone because respondent was still

[15] Indeed, respondent consistently showed by his actions that he did not object to delays. He not only deliberately delayed trial by absconding; even after his recapture, respondent showed no interest in a prompt return to Washington for trial. Although he now complains that he was not brought before a federal magistrate on the bench warrant until the Wednesday following the Friday on which the marshal was notified of the dismisal of the state charges, he made it clear at the time that he was quite ready to postpone the completion of the removal procedures. It was largely because of delays sought by respondent, including his failure to waive the formality of an identification hearing until the day scheduled for it, that those proceedings were not completed for almost a month.

a fugitive. It was the government that had to bear the expense of returning respondent to Washington, escorted by the marshal. And if a reprosecution had been permitted, the government would have had to prepare its case for a third time within a six-month period, a cost and inconvenience wholly attributable to respondent's flight.

Although the court of appeals found no prejudice to petitioner's ability to defend himself, the court nevertheless stated in passing (Pet. App. 17a) that respondent suffered prejudice because "he was incarcerated during the entire period [of pretrial delay]." But in making that observation, the court apparently overlooked the fact that respondent was arrested on a bench warrant charging him with failure to appear for trial, and it was that charge—as to which there was no Speedy Trial Act violation—that resulted in his incarceration between February 5 and the time of his return to Washington for trial.[16] For that reason, the court of appeals erred in considering incarceration as a form of prejudice in this case. See *United States* v. *Salgado-Hernandez*, 790 F.2d at 1268-1269.

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[16] It is reasonably clear that the eight-day period that constituted the violation in this case did not have the effect of delaying respondent's trial date. Respondent was returned to California to testify at the *Seigert* retrial on April 18. Even absent the delay in initiating the removal proceedings and in returning him to Washington after the removal order, it is unlikely that respondent would have arrived in Washington before early April. And it is highly unlikely that respondent's trial could have been held during the period between his return to Washington and April 18, when the district court ordered him returned to California for the *Seigert* retrial, particularly since respondent's counsel was heavily involved in the *Seigert* case. The government and defense counsel would surely have sought, and been granted, a continuance of respondent's trial under Section 3161(h)(3)(B)(8) of the Speedy Trial Act until after the completion of the *Seigert* trial.

The only statutory factor that could be regarded as cutting in respondent's favor is the effect of a reprosecution on the administration of the Speedy Trial Act. Complete absolution is more likely than a dismissal without prejudice to lead to modifications in procedures that will assure more rapid pretrial processing. In one sense, of course, that factor will always weigh in favor of dismissal with prejudice: by increasing the penalty for noncompliance, compliance is always encouraged. Yet by providing for dismissal without prejudice in many cases, Congress indicated that it did not believe the drastic sanction of dismissal with prejudice would always be necessary or appropriate to induce compliance with the Act. Contrary to the assumption of the courts below (Pet. App. 17a-18a, 30a-31a), dismissal without prejudice is not a toothless sanction, and it should suffice in most cases to encourage modifications in procedures.

The sanction of dismissal itself imposes several substantial costs on the government, even when the dismissal is without prejudice. It forces the government to abort its prosecution, frequently on the eve of trial; it requires the government to seek and obtain a new indictment if it decides to reprosecute; and it exposes the government to dismissal on statute of limitations grounds if the limitations period has lapsed prior to the reindictment. See *United States* v. *Peloquin*, 810 F.2d 911, 912-913 (9th Cir. 1987). When a dismissal is ordered after trial or on appeal, the government faces not only the burden of re-presenting the case to a grand jury, but also the burden of conducting a new trial. It was therefore reasonable for Congress to conclude that the burdens and risks inherent in having to start the prosecution again from the beginning will usually be sufficient to encourage the prosecutor to take care to

comply with the provisions of the Act, even if the consequence of failure is not invariably a bar to prosecution altogether. The district court's contrary conclusion—that a dismissal without prejudice would make the Act a "hollow guarantee" (Pet. App. 30a-31a)—is at odds both with the judgment of Congress and with the realities of criminal practice.

This is not a case in which the government knowingly violated the Speedy Trial Act. While the district court found that the government's conduct was "lackadaisical," the Speedy Trial Act principles applicable to the return of fugitive defendants were not settled, and there is no evidence that the marshal in the Northen District of California was aware of the Speedy Trial Act problem in this case at the time of respondent's arrest and the removal proceedings. Moreover, even the didactic effect of a dismissal with prejudice may be minimal in a case such as this one. The Speedy Trial Act violation was attributable to the actions of the United States Marshal in the Northern District of California; the dismissal affected the United States Attorney for the Western District of Washington. While both offices are part of the Department of Justice, and while both may respond generally to the dismissal of prosecutions with prejudice, the impact of such a dismissal is muted when the penalty is assessed against a different office from the one responsible for the violation. In this case, then, even the effect of the dismissal on the administration of the Speedy Trial Act is not a factor that strongly favors dismissal with prejudice.

3. The court of appeals held that the district court's choice of remedy was reviewable only under an abuse of discretion standard and that the court in this case did not abuse its discretion. We agree that a district court enjoys a measure of discretion in selecting the appropriate remedy. See *United States* v. *Fountain*, No. 86-2622 (7th Cir. Feb. 22, 1988) (upholding dismissal without prejudice as within district court's discretion); *United States* v. *Kramer*, 827 F.2d 1174, 1179 (8th Cir. 1987) (reversing dismissal with prejudice as an abuse of discretion); *United States* v. *Phillips*, 775 F.2d at 1455-1456 (same). That discretionary choice, however, is "not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles' " (*Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975) (citation omitted)). To say that the decision is committed to the discretion of the district court "hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review" (*ibid.*). Thus, in order to be upheld under an "abuse of discretion" standard, a district court's decision must reflect consideration of the competing interests, and the balancing of those interests must be reasonable. See *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 257 (1981). That analysis applies to discretionary decisions generally, including a district court's choice of sanctions under the Speedy Trial Act. As the court of appeals explained in *United States* v. *Kramer*, 827 F.2d at 1179:

> An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment.

In this case, the district court abused its discretion in both respects. First, as we have explained, the district court gave only perfunctory consideration to factors such as the seriousness of the offense, the prejudice to the defendant, the relative fault of the parties, and the effect of a "with prejudice" dismissal on the administration of justice. The court instead regarded the didactic effect of

the dismissal with prejudice as the controlling—and virtually dispositive—factor, standing alone.

Second, to the extent that the district court weighed the competing considerations, it committed a clear error of judgment in concluding that the balancing test favored dismissal with prejudice. As we have discussed, when all the factors are weighed the scale tips overwhelmingly in favor of dismissal without prejudice. The brief delay in returning this fugitive to Washington pales in comparison with his serious violations of the narcotics laws, the lack of prejudice, respondent's own responsibility for the delay, and society's interest in seeing that narcotics offenders are justly punished.

Justice is generally served when a criminal case is resolved on the basis of the defendant's guilt or innocence. Here, the lower courts have given respondent his freedom without such a determination. There was no constitutional violation in this case; there was no egregious behavior on the part of the government; and there was no intentional disregard of respondent's statutory speedy trial rights. At worst, there was an inadvertent, technical violation of the Act by the marshal. Dismissal of the indictment without prejudice is a sufficient sanction for an error of that nature. Complete absolution, on the other hand, is a remedy totally disproportionate to the injury suffered or the default on the part of the government, and it is a penalty that society should not be forced to suffer.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 87-573

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA

Petitioner,

v.

LARRY LEE TAYLOR

Respondent.

On Writ Of Certiorari To The
United States Court of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Did the District Court abuse its discretion in imposing the sanction of dismissal with prejudice?

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STATEMENT OF THE CASE

There are no disputes as to the facts and circumstances leading up to November 19, 1984. On November 19, 1984, Respondent failed to appear before the United States District Court, Western District of Washington, for trial on an indictment for narcotics violations. A bench warrant was issued for Respondent's arrest for his failure to appear. (Joint Appendix p.11)[1] Respondent subsequently pled guilty to the violation of 18 USC § 3146, and was sentenced to the maximum of five years. (J.A. p.29) On February 5, 1985, Respondent was arrested in San Mateo, California, pursuant to both Federal and State bench warrants. (Excerpt of Record, 17,21,50).[2] Respondent was placed in custody at the San Mateo County Jail. Pursuant to a Writ of Habeas Corpus Ad Testificandum, the United States Marshal Service (USMS) transported Respondent to Federal custody in the Northern District of California, on February 7, 1985. (E.R. p.50) The writ was issued because Respondent was needed as a witness in a pending Federal case, *United States* v. *Seigert*, CR. 84-0689. Respondent testified in that case on February 21, 1985, and was held in custody subject to recall in the same trial. The *Seigert* trial ended on February 22, 1985. (E.R. p.51)

Respondent continued to be held in Federal custody despite an order from San Mateo County Judge Pliska issued on February 20, 1985, requiring the presence of Respondent on February 28, 1985. (E.R. p.20) The United States Marshal failed to return Respondent to San Mateo authorities, even though the *Seigert* trial ended on February 22, 1985. The Marshal was aware of its obliga-

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[1] (Hereinafter referred to as J.A.)

[2] (Hereinafter referred to as E.R.)

tion to return Respondent to San Mateo. (E.R. p.50,51) On March 6, 1985, Respondent was brought before the Magistrate of the United States District Court for the Northern District, pursuant to the bench warrant issued by the District Court of the Western District of Washington, for his failure to appear there on November 19, 1984. (E.R. p.52) On April 3, 1985 the Magistrate signed an order directing Respondent's removal to the Western District of Washington forthwith. (E.R. p.52)

On April 8, 1985, Respondent was transferred from the San Francisco County Jail, where he had been held in Federal custody since February 7, 1985, to Sutter County Jail in California. Respondent was held there until April 17, 1985, because the USMS decided to round up several other prisoners for transport to Washington, rather than deliver Respondent directly and forthwith. (E.R. p.53) This delay and others, became the pivotal facts in the District Court's finding of a Speedy Trial violation, and its imposition of dismissal with prejudice. (E.R. p.97-98)

On April 17, 1985, Respondent was transported to a county jail in Oregon. On April 18, 1985, the District Court for the Northern District, issued a second Writ of Habeas Corpus Ad Testificandum for Respondent's attendance at a retrial of the *Seigert* case. Within five days of the court order, a Seattle Deputy Marshal flew Respondent directly to California on April 23, 1985. (E.R. p.53)

Retrial of the *Seigert* case was held on May 7, 1985. From May 6 to May 13 of 1985, Respondent remained in Federal custody at the San Francisco Jail. On May 13, 1985, Respondent was transferred to Sacramento County Jail and on May 17, 1985 to Pierce County Jail in the Western District of Washington. (E.R. p.53)

Respondent subsequently filed a motion to dismiss the indictment for Speedy Trial violations as prescribed by 18

U.S.C. § 3162(a)(2). (J.A. p.23) The District Court granted the motion and dismissed two counts with prejudice. In reaching its decision, the District Court made the following findings. The time from Respondent's failure to appear on November 19, 1984, to February 5, 1985, was excluded under § 3162(h)(3)(A). The Court also excluded the time period from February 6, 1985, until February 22 of 1985, pursuant to the terms § 3161(h). The Court concluded that the period from March 6, 1985, until April 3, 1985, was excludable under the general provision of § 3161(h)(1)(G), in connection with removal proceedings. (Petition For Cert. App. B) The Court found the time from April 4, 1985, until April 13, 1985, was excludable under § 3161(h)(1)(H), for transportation of Respondent to Washington. Finally, the Court determined that the period from April 18, 1985, until May 17, 1985, was excludable under § 3161(h), for proceedings related to the *Seigert* retrial.[3]

The Court then turned to the question of whether the mandatory dismissal should be with or without prejudice. As to the first factor under § 3162(a)(2), the Court found that the narcotics offenses were serious. With regard to the second factor, the Court determined that there was simply no excuse for the delays in light of, "the government's lackadaisical behavior . . ." (Petition for Cert. Appendix B p.30(a). This "lackadaisical behavior," was demonstrated over the entire period from February 7 to April 17, 1985. The USMS did not return Respondent to the San Mateo state authorities until February 28, 1985,

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[3] We point out that Respondent's counsel did not participate in the *Seigert* retrial. Petitioner's assertion that he was "heavily involved in the *Seigert* case, is completely inaccurate. (Petitioner's Brief p. 30 fn#16)

even though the *Seigert* trial ended on February 22nd. Even more egregious was the fact that USMS failed to produce Respondent to the San Mateo authorities, even though on February 20th, the San Mateo County Court issued a direct order requiring the presence of Respondent on February 28, 1985. Moreover, "it took the government six more days to arrange for defendant's, (Respondent's), initial appearance before a magistrate, despite the fact that he had been Federal custody in the district for almost a month." (Ibid). The Court further found that the added delay caused by the USMS assembling other prisoners, along with Respondent, in spite of the Court's order for Respondent's removal forthwith, showed a lack "of concern on the government's part" (Ibid.) The Court indicated that, "the government apparently placed more value on accommodating the convenience of the USMS than on complying with the plain language of the Speedy Trial Act." (Ibid) And finally, the District Court addressed the third factor under § 3162(a)(2), and determined that, "the administration of the Speedy Trial Act, and of justice, would be seriously impaired if the Court were not to respond firmly to the instant violation. . . ." (Ibid)

In affirming the decision of the District Court, the Court of Appeal carefully reviewed, de-novo, the findings as to the excludability of the various time periods, and found the District Court's analysis correct as to every period. (Petition for Cert. Appendix A p. 11a - 16a). The Court of Appeal then reviewed the District Court's dismissal with prejudice of the two counts, using an abuse of discretion standard and affirmed that, "under the peculiar circumstances of this case . . . the District Court acted within the bounds of its discretion." (Id. p. 18a).

ARGUMENT

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN IMPOSING THE SANCTION OF DISMISSAL WITH PREJUDICE?

The United States of America, as Petitioner, begins its analysis by offering a balancing test approach in determining whether a dismissal with prejudice is appropriate. Petitioner argues that all of the enumerated factors articulated in 18 U.S.C. § 3162(a)(2) "cut in favor of permitting reprosecution" (Petitioner's Brief (hereafter referred to as P.B.) p.22) Petitioner contends that the District Court abused its discretion under § 3162(a)(2) by entering "a 'with prejudice' dismissal for only one reason: because in the court's view, the government had acted in a 'lackadaisical' manner in arranging for the removal proceedings and Respondent's return to Washington." (P.B. p.15). This assertion misrepresents the basis of the District Court's decision. In its decision of August 1, 1985, the Court carefully considered the three statutory factors:

> "Regarding the *first factor* as applied to the instant case, there is no question that the *drug violations* which the defendant is charged are *serious*. However, the *second factor*, the circumstances of the case leading to the dismissal, tends strongly to support the conclusion that the dismissal must be with prejudice. *There is simply no excuse for the government's* lackadaisical behavior in this case. . .
>
> *Pursuant to the third factor*, the court concludes that the administration of the Speedy Trial Act and of justice would be seriously impaired if the Court were not to respond to the instant violation. If the government's behavior in this case were to be tacitly condoned by dismissing the indictment without prejudice, then the Speedy Trial Act would become a

hollow guarantee." (Emphasis added.) (Petition. for Cert., Appendix B, p. 30a.)

From this decision, it is clear that the District Court considered all three factors, and found that two of them weighed heavily in favor of a dismissal with prejudice. Therefore, Petitioner's assertion that the District Court's decision to dismiss with prejudice was based solely upon a single factor is fundamentally incorrect.

The District Court found that the facts and circumstances that led to the dismissal tended "strongly to support" a dismissal with prejudice. (Ibid). Petitioner, nevertheless, argues that the second factor "strongly favors dismissal without prejudice." (P.B. p.27) It concedes that "[f]or purposes of this case, we do not dispute that the marshal was slower in performing this task than the Speedy Trial Act permits." (Ibid.) Rather, it pursues a line of reasoning that Respondent caused the delay, and as a result, a dismissal with prejudice is unjustified. In particular, Petitioner underscores the fact that Respondent fled the jurisdiction on the scheduled day of trial. This factual observation is beside the point. Congress clearly contemplated the problem of post-indictment fugitives by enacting § 3161 (h)(3)(A) of the Speedy Trial Act.[4] "In an effort to temper the harshness of these relatively short time limits, and to provide the courts with some guidance in distinguishing between 'good' and 'bad' delays, Congress provided a series of exceptions and excludable time periods . . . [one of which was] absence or unavailability of the defendant . . ." 43 *University of Chicago Law Review* 667, 671 (1976) "[T]he language of these provisions is

[4] See Petition for Cert., Appendix B. District Court opinion, p. 29a: "Surely Congress knew . . . that defendants would not conduct their lives so as to enhance the government's convenience."

flexible enough to accommodate almost any form of delay. (*id.*, at 681). By virtue of its broad and precise structure, the Act reaches virtually every phase and circumstance of the criminal trial process. (See generally, Misner, Speedy Trial, Fed. & State Practice (1983).)

In this case, the District Court correctly applied § 3161(h)(3)(A) by excluding the period between Respondent's scheduled trial date and his capture in February. Consequently, the delay caused by Respondent in fleeing Washington to California is simply not relevant to the present analysis. *The only Speedy Trial delays in question are the ones caused by the marshal who was slow in "performing his task."* (Emphasis added.) (P.B. p.27).[5] One cannot argue that the Respondent contributed to the delay in his return to Washington, or the other delays found by the trial court and conceded by Petitioner. However, as the District Court correctly pointed out, there was, "simply no excuse for the government's lackadaisical behavior in this case . . . Instead of responding with dispatch, the government apparently placed more value on accommodating the convenience of the USMS than on complying with the plain language of the Speedy Trial Act." (Petition for Cert., Appendix B, p. 30a.) This same concern that marshals were not promptly transporting defendants was voiced in the House debate: *"prisoners aren't moved immediately when ready because marshals try to make their trips worthwhile by combining the movement of several prisoners . . . ."* (Emphasis added.) (Testimony of U.S. Atty Treece, D. Colo., H.R. Rep. No.

[5] This distinction may be explained in terms of causation principles. Respondent's conduct was not a cause, in fact, of the Speedy Trial delays at issue. Petitioner's reliance upon Respondent's flight in its argument merely confuses the analysis.

93-1508, 2d Session., p. 31 (1974); The House Committee made it clear that it could not conclude "that inconvenience to the United States Marshals, or the minimal expense of transporting prisoners is an excuse for delaying the arraignment of a defendant. This provision is not intended to give the attorney for the *government the discretion to extend the time for arraignment beyond ten days where the defendants presence could have been obtained in the exercise of prosecutorial initiative.*" Ibid. (emphasis added). This Congressional intent surely applies where transportation time is specifically limited as in § 3161(h)(1)(H). Therefore, the government exceeded the clearly delineated time limits of the Act solely as a result of its own "lackadaisical conduct." By suggesting that the dismissal with prejudice sanction should not apply to a post-indictment fugitive, the Petitioner, in effect, is arguing for a change in the statute, not for its proper construction.[6]

Petitioner also maintains that the delays "were not attributable to any intentional government misconduct or even negligence that resulted in prejudice to Respondent." (P.B., p.27.) This compound statement confuses the inquiry. First, while the government's delay was not motivated by evil intentions, the District Court found that it was attributable to careless and inexcusable conduct. Petitioner offers no explanation for the series of delays in

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[6] See Court of Appeal's opinion (filed July 13, 1987) discussing proposal and rejection of a bill providing for extension of speedy trial time in cases involving fugitive defendants (Petition for Cert., Appendix A, pp. 7a, 8a, 9a, 10, 11a).

This Court has disapproved of judicial legislation. (*TVA* v. *Hill* (1977) 437 U.S. 153, 194.) "Our individual appraisal of the wisdom or unwisdom of a particular course selected by the Congress is to be put aside in the process of interpreting a statute."

returning the Respondent back to Washington.[7] "Some affirmative justification must be demonstrated to warrant a dismissal without prejudice. "*United States* v. *Russo* 741 F 2d. 1264, 1267 (11th Cir. 1984);.*United States* v. *Caparella* 716 F. 2d 976, 980 (2nd Cir.1983) Instead, Petitioner employs bootstrap reasoning by insisting that the violation of the Act was caused, in large part, by Respondent's flight.[8]

Second, Petitioner argues that no prejudice against Respondent resulted from the government's negligence. Petitioner states on page 21 of its brief:

> "Congress intended that prejudice to the defendant would be one of the factors bearing on whether the dismissal should be with or without prejudice. That much is apparent from the language of § 3162(a)(2), which requires the court to consider the impact of reprosecution on the administration of justice, and it is clear from the House debates, where the sponsors agreed that prejudice to the defendant was a proper factor to consider in deciding whether to bar reprosecution. (P.B. pp.21-22.)

The argument Petitioner attempts to make here is that the language of § 3162(a)(2) embraces prejudice to the defendant as a required factor in the dismissal determina-

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[7] The government was afforded the opportunity to rebut the presumption of an unreasonable delay pursuant to 18 U.S.C. 3161 (h)(1)(H). The government could not meet the burden and therefore, the District Court found that the delay following the 10-day period was unreasonable.

[8] Throughout its brief, Petitioner argues that Respondent should not profit from his own wrongdoing. Petitioner, however, fails to mention that Respondent received a five year sentence for the bail-jump offense. Moreover, the period of time from Respondent's flight to his capture, was excluded. It is hard to see how, in any way, Respondent profited from his flight.

tion. Nowhere does this factor find expression in the language of the statute. Without more, Petitioner cannot persuasively argue that prejudice to the defendant was a central legislative objective behind the dismissal provision. Nevertheless, Petitioner contends, without citation, that this factor is implied in the phrase "impact of the reprosecution on the administration of justice". Petitioner is simply wrong. The point of the Congressional debate over the inclusion of prejudice to the defendant, was in fact, whether it could be included under the *second* factor, (the facts and circumstances leading to the dismissal), not as Petitioner argues, under the third factor, (impact of a reprosecution on the administration of justice and the Act.) In addition to this misreading of the legislative history, Petitioner completely distorts the real result of the debate, namely, that a *requirement* of prejudice to the defendant was undesirable because it would confirm the existing practice, and effectively gut the purpose and effect of the Speedy Trial Act. (A.Partridge, Legislative History of Title 1 of the Speedy Trial Act of 1974 [Federal Judicial Center 1980] pp.220-222)

Petitioner further derives its interpretation of the dismissal section from "the House Debates." But where, as here, a statute speaks in clear and simple language, resort to legislative history is unnecessary. *Reagan, Secretary of the Treasury* v. *Wald* (1983) 468 U.S. 222; *United States* v. *Public Utilities Commission* (1947) 330 U.S. 295. But even if we turn to legislative history for interpretive aid, we find that both the House and the Senate expressed disapproval "with the speed in which criminal cases were being processed." *Misner,* Act of 1974, p. 299. In fact, "(t)he Speedy Trial Act was enacted in part out of dissatisfaction with Sixth Amendment Speedy Trial Jurisprudence, and to put more life into defendants' Speedy Trial

Rights." *United States* v. *Nance* 666 F 2d 353 (9th Cir.1982). Sam Irwin, the senator who introduced the bill, stated, "there is no question in my mind that speedy trial will never be a reality until Congress makes clear to all that it will no longer tolerate delay . . ." (Misner, *supra*, 299.)

In addition we point out that in Colloquy, at the 1974 House Floor Debate 120 Congress Rec. 41777-78 and 41794-95, the following discussions illustrate how § 3162(a)(2), was adopted by floor amendment as a compromise between the sponsors of the Speedy Trial Act and the Department of Justice.

> [Mr. Cohen] "The amendment I intended to offer later this morning will, I believe, remove any serious objection to this Act by leaving dismissal with or without prejudice up the the Court. . ."
>
> [Mr. Dennis] "As I understand the thrust of the [amendment][9] rather than making the dismissal, when the time limits are exceeded, with prejudice so that no prosecution can be brought up again, this will make that question discretionary also with the Court, as to whether he dismisses with or without prejudice. (A. Partridge, p. 218)

Mr. Cohen agreed and then listed the main factors which the Court should consider: "the gravity or seriousness of the offense, the reason why the case could not be prosecuted within the time limitation, and third, whether the ends of justice are, in fact, being served by dismissing with prejudice. (Id at p. 218)

Mr. Dennis was of the opinion that the Court should consider the degree of prejudice to the Defendant's ability to prepare his case. Mr. Cohen, in response, stated:

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[9] The text reads [argument]; the footnote indicates that in the original it probably should be *amendment*.

> "I have to disagree with the Department of Justice in that regard. They simply would confirm the existing practice—that he would have the normal time granted and then there would be dismissal, whether this was due to laziness of the prosecutor or whatever, then they would start all over again. That frustrates the purpose of this Act. We are trying to put some sanctions in to try to discipline our judicial system, the court, the prosecutor and the defense counsel, and there are reasonable exclusions that take into account a variety of factors and give the courts some flexibility." (Id at p. 218)

Mr. Cohen cited to the opinions of his peers highly respected in the legal community, regarding the sanction provision of the 1974 Speedy Trial Act, H.R. 17409:

> "Judge Zirpoli, who testified before our committee, although he did not favor the particular measure, did support the dismissal with prejudice.[10]
>
> 'Personally, I would be disposed to accept the view of . . . and I want to make one comment about that, very serious comment. I would be disposed to accept the view of the American Bar. Someone said, well, with rule 50(b), they didn't put those sanctions in effect. Senator Ervin couldn't get those sanctions in effect right away. We had to grapple with the Federal judiciary, we had to grapple with the Department of Justice, but we might get those sanctions included. But you couldn't get them in on the first year or the second year of operation of the plan, just as Senator Ervin couldn't get them in, and there is no reason why, given a little more history, the benefit of experience, we couldn't get them in.' [Hearings, p. 382]. Id

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[10] "Finally, the Committee notes that the spokesman for the Judicial Conference, Judge Zirpoli endorsed the ABA position and offered some valuable insight into the realities of the legislative process now underway"

> at p. 214 quote from 1974 House Committee Report 36-38.
>
> U.S. District Judge Feikens from Michigan supported it. And as I look back through the report filed with the House, I would refer the attention of the Members to page 20, where Justice Rehnquist, then Assistant Attorney General, said the following:"
>
> "Therefore, we are unwilling to categorically oppose the mandatory provision. For it may well be, Mr. Chairman, that the whole system of Federal justice needs to be shaken by the scruff of the neck, and brought up short with a relatively peremptory instruction to prosecutors, defense counsel and judges alike that criminal cases must be tried within a particular period of time. That is certainly the import of the mandatory dismissal provisions of your bill."

In the interest of having the Act signed into law, Mr. Cohen offered the present language of § 3162(a)(2) as a compromise, thereby eliminating the objection of the Department of Justice. (Id at p.219). Nevertheless, Mr. Dennis continued to press for his proposal that a prerequisite finding of prejudice to the Defendant be made a part of the dismissal sanction. He stated that if it was not written into Mr. Cohen's compromise amendment he wanted to state that it was important for the judge to consider, thus making it a part of legislative history. After Mr. Dennis prodded Mr. Cohen to accede, Mr. Cohen responded:

> "What I am indicating is that we not consider it as a separate independent ground for the prosecution and open up to the Justice Department and the Prosecutor to say we have not met the time limit and we did not take advantage of all other time exemptions, but there is no prejudice to the defendant. I do not think that would be a sufficient basis in the considera-

> tion of the other factors to determine if justice could be done. (Id. at p.219)

Apparently, not satisfied with Mr. Cohen's remark, Mr. Dennis proceeded to ask the author of the bill, Congressman Conyers, his opinion. Mr. Conyers answered:

> "This fact and circumstances of the case could include the degree to which the defendant might have been prejudiced. This does not alter, I say to my friend, the gentleman from Indiana (Mr. Dennis) the fact that the expiration of the time limits subject to these conditions are a condition in and of themselves for a dismissal. (Id. at p.222)

To appreciate the purpose and intended effect of § 3162(a)(2), one must carefully contrast the distinguishing features of the statutory standard of dismissal from those of its constitutional counterpart. The existing constitutional standard under *Barker* v. *Wingo* (1972) 407 U.S. 514, 531-33 provides, as two of its factors, prejudice to the defendant and length of delay. Section 3162 (a)(2) does not. These omissions are perhaps the most remarkable and telling aspect of the dismissal provision. By clear implication, Congress expressed its intent to remove these factors as *required* considerations in the statutory dismissal analysis. (*Passenger Corp* v. *Passenger Assn.* (1973) 414 U.S. 453, 458, applying the canon of statutory construction expressio unius est exclusio alterius.).[11] (See in accord, *Fedorendko* v. *United States* (1980) 449 U.S.

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[11] The Petitioner's interpretation of the provision, in effect, is a mere codification of the constitutional standard. If length of delay and prejudice to defendant are to be considered required factors in the statutory dismissal analysis, they must be found within four corners of the Act. Furthermore, ". . . the House debates indicate that the prejudice factor is neither a necessary or sufficient consideration." (43 U. Chicago L. Rev. 667, 706, fn. 190.)

490, 512; *United States* v. *MacCollum* (1975) 426 U.S. 317, 321.) This underlying motive was explained in the House Report:

> The Committee finds that the adoption of speedy trial legislation is necessary in order to give real meaning to the Sixth Amendment right. Thus far, neither the decisions of the Supreme Court nor the implementation of Rule 50(b) of the Federal Rules of Criminal Procedure, concerning plans for achieving the prompt disposition of criminal cases, provides the courts with adequate guidance on this question.
>
> The Supreme Court has held that the right to a speedy trial is relative and depends upon a number of factors. A delay of one year in some instances had been interpreted as prima facie evidence of a denial of the right. However, in others, a delay of up to eighteen years has been held not to violate the Sixth Amendment. In its 1972 decision, *Barker* v. *Wingo*, 407 U.S. 514, the Court stressed four factors in determining whether a speedy trial had been denied to a defendant: length of delay, the reason for the delay, the defendant's assertion of the right, and prejudice to the defendant. The task of balancing these factors and arriving at a conclusion which is fair in all cases is difficult. *It provides no guidance to either the defendant or the criminal justice system. It is, in effect, a neutral test which reinforces the legitimacy of delay.*
>
> With respect to providing time periods in which a defendant must be brought to trial, the Court in *Barker* admitted that such a ruling would have the virtue of clarifying when the right is infringed and simplifying the courts' application of it. However, the Court said: But such a result would require this Court to engage in legislative rule-making activity, rather than in the adjudicative process to which we should confine our efforts. Id at 523." (Emphasis added). (Misner, *supra*, p.305)

Apart from the fact that § 3162(a)(2) omits the aforementioned factors required under the Constitutional standard, the statute is different in other respects. First, the statute places mandatory procedural requirements on the defendant not imposed under the constitutional standard. For example, the defendant may waive the remedy of a Speedy Trial Act violation-not so under *Barker* v. *Wingo* (supra 407 U.S. at 528). Second, under *Barker* v. *Wingo*, this Court stressed flexibility over precision in measuring the time periods applicable to the Sixth Amendment Right to a Speedy Trial. (Id at 529). In contrast, the time limitations set forth in the Act are precise and mandatory. Third, once a District Court finds a Sixth Amendment violation it is required to dismiss with prejudice. On the other hand, a court, following a finding of a Speedy Trial Act violation, has the discretion to impose a dismissal either with or without prejudice. All of these differences strongly indicate that the statutory analysis was to be quite different from and independent of its constitutional corollary. By introducing the length of delay and prejudice to the defendant factors into the present analysis, Petitioner is attempting to engraft principles applicable under the Sixth Amendment standard onto the statute.

Moreover, it is important to realize that the Speedy Trial Act was enacted to improve the then-existing system. "Remedial statutes are liberally construed to suppress the evil and advance the remedy." (Sutherland, Stat. Const. (1984), § 60.01 p. 29.) Therefore, the differences found in the Speedy Trial Act which clearly set it apart from its constitutional counterpart should be given full effect to advance the remedy contemplated by Congress.

Petitioner's reading of § 3162(a)(2) is problematic for yet another reason. It suggests that a trial court, in its proper

exercise of discretion, is required to balance prejudice to the defendant and the length of the delay against the enumerated factors of the dismissal provision of the Speedy Trial Act. Such an approach creates serious practical problems. Petitioner is suggesting that a District Court should be expected to know and apply a factor that is not even contained in the very language of the provision.[12]

Central to the Petitioner's argument is the fact that the government exceeded the time limits of the Act by only fourteen days, and therefore such a minor violation does not justify a dismissal with prejudice. As discussed, Congress decided not to make the length of delay part of the language or application of the Act. By excluding this factor, Congress implied that, just like prejudice to defendant, it was not a *required* consideration in the dismissal analysis. Moreover, Petitioner's position ignores the basic premise that "the Act's purpose was to fix specific and arbitrary time limits within which various stages of a criminal prosecution must occur." (*United States* v. *Caparella*, *supra* 716 F. 2d 976). "That Congress enacted the Speedy Trial Act of 1974, designed to establish spe-

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[12] In the case at bar, the District Court carefully looked at the "plain language of the Speedy Trial Act", in passing on the dismissal issue. (Petition for Cert., Appendix B, p.30a.) While there are limits to a trial court's discretion, here, it was not abused but rather properly and carefully exercised. (*Albermarle Paper Co.* v. *Moody* (1975) 422 U.S. 405, 416.) Even if we assume for the purpose of this discussion that both length of delay and prejudice to defendant may be considered in the dismissal analysis, this does not mean that they are requirements. Put simply, it may be permissible for a district court to consider them, but it is by no means compelled to do so. A district court certainly does not abuse its discretion by concluding that, under the peculiar facts before it, consideration of them is unnecessary.

cific [and absolute] time limitations between a criminal suspect's arrest and trial . . . ." is apparent from its clear and exacting language. (10 Seton Hall Law Review 539, 553.[1980]) In short, a line must be drawn that applies in all cases.

In the case at bar, the government was fully aware of the time limitations of the Act, yet it disregarded its mandate and failed to prevent a violation of the Act's time limits. As the District Court pointed out, the government was responsible for several inexcusable delays throughout the period from February 5 to April 17, 1985. Respondent was held in Federal custody after the *Seigert* trial ended on February 22, 1985, notwithstanding the fact that an order issued from the San Mateo County Judge on February 20, 1985, requiring the presence of Respondent on February 28, 1985.[13] "It also took the government six more days to arrange for Respondent's initial appearance before a magistrate despite the fact that he had been in Federal custody in the district for almost a month." (Pet. Cert. App. B p.30a). And finally, the government failed to transport Respondent to Washington in a reasonable amount of time. In light of these inexcusable delays, the government is not just guilty of a "minor violation," but of an intentional disregard of its responsibility to effectuate the Act.

Petitioner relies heavily upon the legislative history to support its position that:

> "First, the dismissal-without-prejudice option is a central feature of the Speedy Trial Act . . .; Second, . . . that the statute does not incorporate a presumption in favor of dismissal with prejudice . . .; Third,

[13] This conduct shows a disrespect for a state court order as well as a disregard for the requirements of the Speedy Trial Act.

> Congress intended that prejudice to the defendant is required to be one of the factors bearing on whether the dismissal should be with or without prejudice . .; Fourth, and perhaps most important (the Act) does not bar reprosecution based on the consideration of only one factor, such as the effect that permitting reprosecution would have on encouraging compliance with the (Act) . . ." (P.B. p. 21-22)

Petitioner's reliance upon the legislative history is misplaced. Regarding Petitioner's first and third propositions, the legislative history is, at best, conflicting and inconclusive. There are passages equally in support for the dismissal with prejudice sanction:

> (For Example), "[n]either the House or Senate bills, from which the Act evolved, contained the present language which allows the Court to dismiss with or without prejudice after consideration of listed factors. The 1974 House subcommittee bill contained a bar to re-prosecution of those cases which had exceeded the speedy trial time limits. The Senate bill allowed reprosecution only 'if the court in which the original action was pending finds that the attorney for the government had presented compelling evidence that the delay was caused by exceptional circumstances which the government and the court could not have foreseen or avoided." *Misner, supra*, p. 296.)

By selectively citing to excerpts from legislative reports and debates, Petitioner offers a biased and unrepresentative view of the collective intent of Congress. Where the legislative history is uncertain and indefinite, one must return to the plain wording of the statute with even greater attention. *Ford Motor Credit Co.* v. *Cenance* 452 U.S. 155, 158 (1981); *United States* v. *Russo* 714 F. 2d 1264, 1266 (11th Cir. 1984).

As has been demonstrated, neither a requirement of prejudice to the defendant nor the notion that the dis-

missal without prejudice is a central feature of the Act is found in the language of the statute or its legislative history. In *U.S.* v. *Russo* (supra at 1266), the court observed that, "the language of the statute specifies the availability of both remedies. Therefore, without more, it is evident that neither dismissal sanction has priority . . .";*In Accord, United States* v. *Kramer* 827 F. 2d. 1174, 1176 (1987); *United States* v. *Caparella* 741 F. 2d 1264, 1266 (11th Cir. 1984).

Respondent agrees with Petitioner's fourth argument that § 3162 (a)(2) does not turn upon the consideration of only one factor. Nevertheless, as discussed above, the District Court considered all three of the enumerated factors in its decision to dismiss with prejudice. Respondent also concurs with Petitioner's second argument that there is no presumption in favor of dismissal with prejudice. More than anything, the Speedy Trial Act is the result of a lengthy and hard-fought compromise between proponents for and against the dismissal with prejudice sanction. With this idea in mind, Congress committed this determination to the broad discretion of the district courts:

> "The amount of discretion given to the courts appears to be at least as great as that implicit in the 'ends of justice' continuance provisions . . ." (43 *University of Chicago Law Review* 667, 704); "[w]e prefer to follow the thrust of the compromise reached in Congress and leave the discretionary decision on whether dismissal is with or without prejudice to the courts . . ." (*United States* v. *Caparella* 716 F. 2d 976, 980 [2nd Cir. 1983]) "the proper dismissal sanction to be imposed in each case is a matter left to the exercise of the sound discretion of the trial judge after consideration of the factors enumerated in the statute." (*United States* v. *Russo, supra*, 741 F. 2d at 1267). A reviewing court was "not delegated the role of decision maker under the Speedy Trial Act, but the District Court was." (*U.S.* v. *Kramer* 827 F.2d 1174, 1179 (8th Cir. 1987) (dissenting opinion.)

On page 28 of its brief, Petitioner attempts to summarize the core meaning of the factor, ". . . the impact of a reprosecution on the administration of the Act, and on the administration of justice." Petitioner posits that a reprosecution in this case would serve the didactic purpose of sending, ". . . a message to defendants that they will not profit from absconding." Petitioner has placed undue emphasis on this point. Respondent in no way profited from his flight. His flight merely triggered the application of § 3161(h)(3)(A), thereby excluding the entire period from his flight to his capture. Respondent gained no advantage in terms of exhausting Speedy Trial Act time limitations.

Closer to the central issue of the dismissal sanction is the "effect of reprosecution on the administration of the Speedy Trial Act." (P.B. p.31) As Petitioner concedes, "(c)omplete absolution is more likely than a dismissal without prejudice to lead to modification, in procedures that will assure more rapid pretrial processing." (Ibid.) One scholar has pointed out:

> "The impact of a reprosecution on the administration of this chapter and on the administration of justice, should not be read as centering attention on whether the court could handle one additional case. The factor should interpreted as asking whether the granting of a dismissal without prejudice will undermine the effectiveness of the Act to force the generally-recalcitrant participants in the Criminal Justice System to move ahead with deliberate speed." (Misner, supra p.302)[14]

[14] At most, the government's interest in administering justice is balanced by the competing interest in administering the Act, thus rendering the third factor neutral. (*United States* v. *Russo*, supra at 1267)

This critical factor was significant in the District Court's determination to dismiss with prejudice. The intended effect of the Court's carefully reasoned decision was to issue a directive to the government that a "lackadaisical" attitude and general lack of responsiveness to the call of the Speedy Trial Act, will no longer be tolerated. An affirmance by this Court will reinforce this principle.

Petitioner takes issue with the District Court's characterization of the government's "lackadaisical" conduct. (P.B. p. 32) Petitioner makes the claim that "that Speedy Trial Act principles applicable to the return of fugitive defendants were not settled, and there is no evidence that the marshal in the Northern District of California was aware of the Speedy Trial principle in this case at the time of Respondent's arrest and removal proceedings." (Ibid.) The implications of Petitioner's position are dangerous. All agencies of the government responsible for the delivery of the defendant must be charged with knowledge of the applicable law. If not, the government would ultimately be free from accountability for the action or inaction of its agencies. This result would have the effect of shielding the government from answering to the courts for Speedy Trial violations. *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 634, (1961) (applying the doctrine of imputed knowledge.) In this case, the prosecuting attorney was charged with the affirmative duty to alert the marshals of the Speedy Trial problems. His failure to so alert the marshal does not excuse the government for allowing a violation of the Act. It is, in fact, the "lackadaisical behavior," the District Court condemned.

CONCLUSION

There is a mosaic of facts, circumstances, nuances, attitudes, and conclusions that presents itself before a

trial court. This picture loses much of its essential character when it takes the form of a "cold" appellate record. In this case, for example, the District Court evaluated the attitude of the prosecutor as to his duty to enforce the Act's time requirements. The District Court was sensitive to the prosecutor's failure to carry out any of his responsibilities under the Act. The Court noted that the prosecutor did nothing to assure that the marshals moved Respondent with dispatch. The prosecutor was notified of Respondent's arrest on February 5, 1985, and was kept informed of the events leading up to the disposition of this case. (E.R. 70). The District Court also noted the prosecutor's persistence in misreading the Act's provision, and apparent antipathy towards a post indictment fugitive's Speedy Trial rights. The prosecution never admitted that the government exceeded the time limitations. Only at the present stage of this Appeal does the government concede that it violated the Act's time requirements.

The District Court also knew that Respondent's co-defendant had received a three year sentence for the same offenses. This allowed the District Court, without demeaning the seriousness of the charges against Respondent, to ensure a more responsive attitude on the part of the United States Attorney. The District Court did this by dismissing the counts with prejudice and giving Respondent the maximum Five year sentence for the bail-jump offense. The District Court realized that the nature of the delays was of such character that it would reoccur, and that fact made it even more important to respond sternly.

Examining this District Court's decision in its entirety, we see that the Court was faced with a recalcitrant prosecutor who simply refused to accept the fact that the

Speedy Trial Act applies to post-indictment fugitives. The District Court, an experienced trial court, knew that it could substantially increase the Respondent's sentence by giving him, (which it did), the five year sentence. It could punish Respondent sufficiently and still preserve the integrity of the Speedy Trial Act. These considerations, among others, are not readily apparent from reviewing the appellate record. They are, practically speaking, an integral part of the day to day decisions of a trial court.

The trial court sits in the unique position to evaluate the circumstances surrounding a Speedy Trial violation, and the effect it will or may have on the Court's ability to administer the act. For this reason, and others, Congress placed broad discretion in the trial court to determine the appropriate remedy. Once a district court judge, who has followed the case and the parties from the beginning, reviews the enumerated factors as they apply to the particular case, and considers the entire, unique set of facts and competing considerations present in the case, it has properly exercised its discretion. The Court of Appeal recognized the unique vantage point of the trial court in making its decision after considering all these factors. The Court of Appeal's decision that the trial court properly exercised its discretion is correct and proper.

Respectfully submitted

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No. 87-573

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

LARRY LEE TAYLOR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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REPLY BRIEF FOR THE UNITED STATES

1. Respondent acknowledges that if a district court finds a violation of the 70-day time limit under the Speedy Trial Act, it must apply a balancing approach to determine whether the circumstances of the case, considered together, are sufficiently aggravated to warrant dismissal of the indictment with prejudice. 18 U.S.C. 3162(a)(2). And respondent does not disagree with our submission (Gov't Br. 26) and the conclusion by both courts below (Pet. App. 17a, 30a) that the first of the statutorily specified factors, "the seriousness of the offense" (18 U.S.C. 3162(a)(2)), weighs against dismissal with prejudice in this case.[1] But respondent does take issue with our position regarding the other factors that must be taken into account.

Significantly, respondent does not dispute our submission that *if* the other factors we have addressed in our opening brief are included in the balancing process, they

[1] Respondent was charged with possession of cocaine with intent to distribute it (in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)) and conspiring to possess cocaine with intent to distribute (in violation of 21 U.S.C. 846). E.R. 1-2.

(like the seriousness of the offense) weigh heavily against dismissal of the indictment with prejudice. Thus, respondent does not dispute that the 14-day excess found by the courts below was minimal (Gov't Br. 26-27);[2] that he was not prejudiced by the passage of those 14 days (*id.* at 27, 29-30); that the delay was not attributable to any knowing violation or intentional misconduct by the government (*id.* at 27, 32); and that he was responsible for precipitating the possibility of a Speedy Trial Act violation by failing to appear for trial on November 19, 1984, within the 70-day period (*id.* at 27-28). Instead, respondent contends that those factors may be altogether excluded from the balancing process under 18 U.S.C. 3162(a)(2). With those factors put to one side, respondent then argues that what he terms the "lackadaisical" manner in which the government returned him to Washington after he was apprehended in California, considered in isolation, justified dismissal of the indictment with prejudice.

The Speedy Trial Act does not permit so narrow an inquiry into a question of such fundamental importance to the administration of justice and the protection of society as whether the government will be forever barred from prosecuting serious charges against the accused. Section 3162(a)(2) provides (emphasis added):

> In determining whether to dismiss the case with or without prejudice, the court *shall consider, among others, each of the following factors*: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the Act] and on the administration of justice.

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[2] Contrary to respondent's assertion (Br. 30), we merely assume arguendo—we do not concede—that there was actually a violation of the Speedy Trial Act in this case. See Gov't Br. 5-6, 23-24 & nn. 4, 13.

This provision on its face mandates an inquiry into *all* the "facts and circumstances" of the particular case, as well as broader questions concerning the administration of the Speedy Trial Act and the criminal justice system as a whole, and any "other[]" factors that reasonably should inform the court's judgment. All of these factors must be considered in aid of the ultimate determination whether—after the considerations weighing against dismissal with prejudice are offset against those that weigh in favor—the net circumstances of the case are so aggravated that dismissal with prejudice is a proper sanction. When the various factors in this case are fully considered in this manner, it is clear that the courts below erred in barring a reprosecution of respondent.

2.a. Although respondent agrees that the length of delay is pertinent in determining whether an indictment should be dismissed with prejudice because of a violation of the Speedy Trial Clause of the Sixth Amendment (Resp. Br. 14, citing *Barker* v. *Wingo*, 407 U.S. 514, 531-533 (1972)), he argues (Resp. Br. 14-18) that the length of the delay should play no part in determining whether an indictment should be dismissed with prejudice where the time limits of the Speedy Trial Act have been exceeded. However, because the Speedy Trial Act was passed in part to protect the defendant's Sixth Amendment right to a speedy trial (see *United States* v. *Rojas-Contreras*, 474 U.S. 231, 238 (1985) (Blackmun, J., concurring), quoting H.R. Rep. 96-390, 96th Cong., 1st Sess. 3 (1979); S. Rep. 93-1021, 93d Cong., 2d Sess. 1 (1974)), it should not lightly be presumed that Congress would altogether exclude from consideration under the Act any of the factors that are relevant to the Sixth Amendment inquiry. And an analysis of the Act demonstrates that Congress did not do so.

In support of his argument that a court may ignore the length of the delay, respondent relies on the fact that the Speedy Trial Act, unlike the Sixth Amendment and this Court's decisions arising under it, establishes a specific and absolute time limit (subject to specified exclusions) within which a trial is to be commenced. Resp. Br. 16, 17-18. Respondent, however, misses the significance of the time limit. It simply defines when a violation of the Act has occurred: whether the 70-day limit has been exceeded by 23 months (as in *United States* v. *Stayton*, 791 F.2d 17, 21-22 (2d Cir. 1986)), by 14 days (as the courts below found in this case), or by even one day, the Act has been violated and indictment must be dismissed. 18 U.S.C. 3162(a)(2).

Congress did not, however, inflexibly direct that any such dismissal must be with prejudice, irrespective of the extent to which the 70-day limit was exceeded. Congress directed the court to make a further and distinct determination of whether the defendant may be reprosecuted, notwithstanding the fact the 70-day limit was violated. Moreover, Congress directed the court in making that determination to consider, inter alia, "the facts and circumstances of the case that led to the dismissal." 18 U.S.C. 3162(a)(2). The period of time in excess of the statutory 70-day limit is of course the most significant "fact" or "circumstance" that leads to the dismissal of *any* case under the Speedy Trial Act. Section 3162(a)(2) therefore clearly contemplates that a district court will consider the period of delay, and it is obvious that the most severe sanction (dismissal with prejudice, without possibility of reprosecution) should be reserved for the most egregious violations. Compare *Shepard* v. *NLRB*, 459 U.S. 344, 350 (1983). For example, although a 23-month overage would weigh heavily in favor of dismissal with prejudice (see *United States* v. *Stayton, supra*), a one-day overage would tip the scale with equal

force in the opposite direction. Consistent with this view, the courts of appeals have uniformly considered the length of the delay in determining the appropriate remedy for a statutory speedy trial violation.[3] Because the delay in this case was minimal, that factor plainly weighs against dismissal with prejudice.[4]

b. For similar reasons, respondent errs in contending (Br. 6-7) that his flight from Washington on the day of trial "is simply not relevant to the present analysis" and is "beside the point." Respondent relies (Br. 7-8, 20-21) on statutory provisions and legislative history pertaining to the calculation of excludable delay due to the transportation of prisoners, removal hearings, and a defendant's absence from the charging district. See 18 U.S.C. 3161(h)(1)(G) and (H) and 3161(h)(3)(A).[5] But once again,

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[3] See, *e.g.*, *United States* v. *Melguizo*, 824 F.2d 370, 372 (5th Cir. 1987), petition for cert. pending, No. 87-551; *United States* v. *Stayton*, 791 F.2d 17, 21-22 (2d Cir. 1986); *United States* v. *Salgado-Hernandez*, 790 F.2d 1265, 1268 (5th Cir. 1986), cert. denied, No. 86-5229 (Nov. 17, 1986); *United States* v. *Simmons*, 786 F.2d 479, 485 (1986), vacated on other grounds, 812 F.2d 818, 819 (2d Cir. 1987); *United States* v. *Phillips*, 775 F.2d 1454, 1455-1456 (11th Cir. 1985); *United States* v. *Brown*, 770 F.2d 241, 244 (1st Cir. 1985), cert. denied, 474 U.S. 1064 (1986); *United States* v. *Russo*, 741 F.2d 1264, 1267 (11th Cir. 1984); *United States* v. *Hawthorne*, 705 F.2d 258, 260-261 (7th Cir. 1983); *United States* v. *Carreon*, 626 F.2d 528, 533-534 (7th Cir. 1980).

[4] The court of appeals, unlike respondent, did not regard the length of the delay as irrelevant. It expressed the view that the 14-day delay, "although not wholly insubstantial, was not so great as to mandate dismissal with prejudice" (Pet. App. 16a-17a).

[5] Respondent also relies (Br. 8 n.6) on the fact that Congress did not adopt a proposal by the Department of Justice that would have started a new 70-day period following the capture of a defendant who fled prior to trial, and elected instead to exclude delay caused by flight from the original 70-day period. See generally A. Partridge,

the statutory provisions and legislative history upon which respondent relies go to the question of whether the time limits in the Act were violated; they do not address the distinct question of remedy.

There is nothing in the text or legislative history of the Act that manifests any intention by Congress to exclude from the balancing test set forth in Section 3162(a)(2) the effect of a defendant's flight. To the contrary, respondent's flight was one of the "facts and circumstances of the case that led to the dismissal." 18 U.S.C. 3162(a)(2). Indeed, it was a "but for" cause of the dismissal: if respondent had appeared for trial on the scheduled date within the 70-day period, there would have been no Speedy Trial Act violation. The fact that respondent was subsequently apprehended in California, and that the courts below found that the government took somewhat longer than it might have in returning him to Washington for trial, does not somehow absolve respondent of his responsibility for precipitating the occasion for a Speedy Trial Act violation in the first place.

Respondent's flight also is made relevant by the remaining factors listed in 18 U.S.C. 3162(a)(2): "the impact of a reprosecution on the administration of [the Act] and on the administration of justice." By deliberately failing to appear for a trial that was scheduled to comply with the 70-day time limit under the Speedy Trial Act, respondent deliberately flouted the Act and one of its underlying purposes: to promote the public interest in the prompt disposition of criminal charges. Respondent's flight also undermined respect for the courts, and it interfered with the sound administration of justice by imposing burdens on the government in rescheduling a separate trial of

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Legislative History of Title I of the Speedy Trial Act of 1974, at 118-125 (Fed. Judicial Center 1980).

respondent's co-defendants, as well as respondent's own trial. See Gov't Br. 29-30.[6] Permitting a reprosecution of respondent in these circumstances would have a positive impact on the administration of the Speedy Trial Act by demonstrating that the intentional disregarding of its provisions for a tactical advantage will not be countenanced; and permitting a reprosecution would have a positive impact on the administration of justice generally by serving to deter serious interruptions of the sort perpetrated by respondent.

More broadly, the sanction provision of the Speedy Trial Act requires the district court to assess the relative equities in order to determine whether, on balance, they weigh so strongly in favor of the defendant that reprosecution should be barred and the defendant given complete immunity for his crimes. Here, the period of delay between respondent's failure to appear for trial and the date on which he was apprehended (75 days) far exceeded the brief period of non-excludable delay (14 days at most) that was attributable to the Marshals Service in returning him to Washington from the place to which he had fled. In

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[6] The text and legislative history of the Speedy Trial Act recognize that the policies of the Act are served by joint trials, because they promote economy and eliminate duplication in the disposition of criminal charges, and thereby facilitate the speedy trial of criminal charges generally. See 18 U.S.C. 3161(h)(7) (excluding "[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted"); S. Rep. 96-212, 96th Cong., 1st Sess. 24-25 (1979); *Speedy Trial: Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 255, 258 (1971); *United States* v. *Tobin*, No. 87-5004 (11th Cir. Mar. 23, 1988), slip op. 2146-2147.

addition, respondent's flight dramatically altered the risks for the government, because it deprived the government of the absolute assurance that there would be no violation of the Act if the trial was held as scheduled on November 19, 1984, and instead created a situation in which even the briefest period of non-excludable delay would lead to dismissal of the indictment.

c. Contrary to respondent's contention (Br. 9-14), the absence of any prejudice to him as a result of the brief 14-day period of non-excludable delay plainly is a relevant factor on the question of remedy. Although "prejudice" is not specifically mentioned in Section 3162(a)(2), it is one of the principal considerations to be taken into account by the district court in assessing the "impact of a reprosecution * * * on the administration of justice." Certainly, for example, the administration of justice would be adversely affected if a defendant's ability to defend against the reinstituted charges has been impaired by unnecessary delay; conversely, if the defendant's ability to defend against the charges is unimpaired, the administration of justice would not be adversely affected to any significant extent if he is subject to reprosecution notwithstanding a relatively brief delay beyond the 70-day limit.[7] In fact, the court of appeals, unlike respondent, recognized the relevance of prejudice to the defendant, because it acknowledged that "there is no indication that the delay

[7] Respondent correctly points out (Br. 11, 14) that during the 1974 House debates, Representative Dennis asked whether "the phrase, 'the facts and circumstances of the case which led to the dismissal' [is] broad enough to include the degree of prejudice to the defendant's ability to prepare his case." 120 Cong. Rec. 41795 (1974). In response to this inquiry, Rep. Conyers agreed that it is (*ibid.*). In light of this legislative history, respondent argues (Br. 8-9) that to the extent that prejudice is relevant, it should be included in this second factor. In our view, prejudice is more logically considered as part of the inquiry into the effect of the violation on the administration of justice. See 120 Cong. Rec. 41794 (1974) (remarks of Rep. Cohen). Ultimately, however, it does not matter under which rubric the presence or absence of prejudice is considered. Indeed, the fact that different Members of Congress regarded the possibility of prejudice to the defendant as relevant under each heading—the facts and circumstances of the case, and the impact on the administration of justice—serves to underscore the inescapable relevance of prejudice in the speedy trial setting.

would have prejudiced [respondent] in preparing for trial" (Pet. App. 17a).[8]

The legislative history discussed in our opening brief (at 19) clearly manifests Congress's intention that the presence or absence of prejudice be weighed in the balance. The legislative history upon which respondent relies (Br. 11-14) merely reflects the concern of Representative Cohen that a showing of prejudice to the defendant should not be an absolute prerequisite in every case to dismissal of the indictment with prejudice. See 120 Cong. Rec. 41778, 41794-41795 (1974) (remarks of Rep. Cohen); *id.* at 41795 (remarks of Rep. Conyers). We do not contend otherwise here. In some cases, other considerations, such as a very prolonged period of delay, or intentional manipulation by the government to obtain a tactical advantage, might render the circumstances of the case sufficiently aggravated to justify dismissal with prejudice even in the absence of identifiable prejudice to the defendant. No Member of Congress, however, expressed the view that the

[8] The court of appeals did express the view that respondent was prejudiced by being incarcerated during the entire period (Pet. App. 17a). However, as we have explained in our opening brief (at 30), and as respondent does not dispute, he was in custody during that period on the bench warrant for failure to appear for trial on November 19, 1984, for which there was no Speedy Trial Act violation.

presence or absence of prejudice to the defendant is irrelevant to the determination of the appropriate dismissal sanction, or that the issue of prejudice should be altogether ignored by the district court, as respondent urges.

d. Finally, in contrast to respondent's deliberate disregard of the Act's provisions, the government's actions were, as respondent concedes, "not motivated by evil intentions" (Resp. Br. 8). Where the violation is inadvertent or unintentional and not motivated by any desire to delay the trial or to obtain a tactical advantage, considerations of the administration of the Speedy Trial Act and of the criminal justice system generally do not weigh in favor of the severe sanction of dismissal of the indictment with prejudice. See *United States* v. *Miranda*, 835 F.2d 830, 834-835 (11th Cir. 1988); *United States* v. *Melguizo*, 824 F.2d at 371-372; *United States* v. *Simmons*, 786 F.2d at 484-485.

Respondent relies (Br. 3, 5, 7, 18, 22) on what the courts below characterized as the "lackadaisical" manner in which the Marshals Service returned respondent to Washington after he was apprehended in California, following his escape. However, as Judge Poole explained in his concurring and dissenting opinion below (Pet. App. 19a-22a), dismissal with prejudice was an "unduly harsh" (*id.* at 21a) overreaction. For example, the courts below held that there were six days of non-excludable delay because respondent was not immediately returned to state custody on February 22, 1984 (*id.* at 12a, 28a). However, as we explained in our opening brief (at 24-25), that period was improperly included, because the Marshal was under no obligation to return respondent to Washington while state charges were pending. Moreover, as Judge Poole pointed out, because the state authorities could have obtained custody of respondent—and therefore interrupted

federal custody of him—at any time between February 22 and February 28, "the government cannot be found 'lackadaisical' or irresponsible in not immediately having taken advantage of these few days of [respondent's] presence to begin proceedings against him" (Pet. App. 20a-21a (citation omitted)). And if the Marshal had returned respondent to state custody on February 22, as respondent insists he should have, then the time that respondent remained in state custody until the state charges were dismissed on February 28, 1984 clearly would have been excluded. In short, respondent was not adversely affected by being in federal rather than state custody during that period.

The next period of non-excludable delay charged to the government was the five-day period from March 1, 1984, when the Marshals Service was notified that the state charges against respondent had been dismissed, and March 5, 1984, the day before he was brought before a magistrate to begin removal proceedings. See Pet. App. 12a-13a & n.9, 28a). However, as Judge Poole again pointed out (*id.* at 21a), March 1, 1984 was a Friday, and the record does not show at what time of day the Marshals Service received notice that the state charges had been dropped (see E.R. 51); especially if the notification was received late in the day, it is understandable that respondent's appearance would be put over to the week beginning March 4, 1984. When respondent was brought before the magistrate on March 6, the attorney who was temporarily representing respondent requested that the matter be put over until Friday of that week (March 8, 1984) because Mr. Loveseth, respondent's regular counsel in the case, was unavailable (E.R. 75, 80-81). On March 8, Mr. Loveseth suggested that the magistrate schedule a removal hearing for a later date (E.R. 85). Counsel indicated that

he did not anticipate that a removal hearing would actually be necessary, but he stated that he "would rather keep [respondent] here [in California] and organize what is gonna happen and talk to [the Assistant United States Attorney] up in Seattle" (*ibid.*); he therefore agreed to a continuance to March 18, 1984 (E.R. 86). Then, again at counsel's request, the hearing was scheduled for April 3, 1984 (E.R. 89). On that date, respondent waived his right to a hearing, and the magistrate ordered that he be returned to Washington (E.R. 52). Especially in light of respondent's willingness to remain in California for almost a month after he was first brought before a magistrate there, the brief delay in scheduling that first appearance, assuming it was unreasonable at all under Fed. R. Crim. P. 40(e), plainly did not warrant dismissal of the indictment with prejudice.

The final period of non-excludable delay was the four-day period in excess of the 10 days that the courts found reasonable under 18 U.S.C. 3161(h)(1)(H) for transporting respondent to Washington after the magistrate entered the order of removal (Pet. App. 14a, 28a-29a). But the government submitted an affidavit explaining that this period was attributable to the Marshal's assembling of several prisoners for transportation purposes (E.R. 52-53), "in order to effect economy of expenses" (Pet. App. 21a-22a) (Poole, J., concurring and dissenting)). Even if that period was non-excludable under 18 U.S.C. 3161(h)(1)(H), it did not substantially undermine the policies of the Speedy Trial Act.

e. In sum, none of the 14 days of delay found by the courts below "was of such studied, deliberate, and callous nature as to justify dismissal with prejudice" (Pet. App. 22a (Poole, J., concurring and dissenting)). Because the other factors in this case weigh heavily against dismissal

with prejudice, the district court clearly erred in ordering that severe sanction.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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